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No. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1993

KEITH GORDON KLINGENSTEIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE TOTAL SUPPRESSION OF ALL EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT WHERE THE SEARCHING OFFICERS FLAGRANTLY DISREGARD ITS TERMS DURING EXECUTION.

PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, KEITH GORDON KLINGENSTEIN (hereinafter "Petitioner"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in the above entitled cause on May 14, 1993.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals is reported as *Klingenstein v. State*, 330 Md. 402, 624 A.2d 532 (1993) and is reproduced in the Petitioner's Appendix ("Pet. App.") at 1.

The opinion of the Court of Special Appeals of Maryland is reported as *State v. Klingenstein*, 92 Md. App. 325, 608 A.2d 792 (1992) and is reproduced at Pet. App. 17.

The opinion of the Circuit Court for Prince George's County suppression hearing is unreported and is reproduced at Pet. App. 60.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on May 14, 1993 and the mandate of that Court issued on June 15, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The issues raised in this petition implicate Petitioner's constitutional rights under the Fourth and Fourteenth Amendments of the United States Constitution. Specifically, the Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

The Fourth Amendment is applicable to the States through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Petitioner challenges the reach and constitutionality of the searches conducted in his business and in his home as having violated his constitutional rights under the Fourth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A fifty-four count indictment was filed in the Circuit Court for Prince George's County, Maryland charging Petitioner, a pharmacist, with filling fraudulently issued prescriptions, filing false insurance claims, and other related charges. The circuit court granted Petitioner's

motion to suppress all of the evidence seized at both Petitioner's pharmacy and home. On interlocutory appeal by the State, the order suppressing all of the evidence was vacated by the Court of Special Appeals of Maryland and the case remanded for further hearing. The Court of Appeals of Maryland granted certiorari, and affirmed and reversed the intermediate appellate court in part, ordering the trial court to grant only partial suppression of the search of Petitioner's pharmacy and to make findings on other issues preserved but not addressed below.

I. THE UNDERLYING EVENTS.

A. The investigation.

On January 20 and 21, 1992, the Circuit Court for Prince George's County, the Honorable Larnzell Martin presiding, entertained and granted Petitioner's motion to suppress evidence seized as the result of two search warrants. The evidence seized pursuant to those warrants had formed the basis of a fifty-four count indictment charging Petitioner Klingenstein with distribution of a controlled dangerous substance ("CDS"), possession with intent to distribute CDS, theft, and other offense relating to his alleged filling of forged prescriptions and filing of false insurance claims with Blue Cross and Blue Shield of Maryland.

The affidavit for the first search for Petitioner's pharmacy recited that an individual named Brian Firor had been arrested by Maryland State Police officers on October 5, 1990 after he had attempted to use forged prescriptions to obtain drugs from pharmacies in Washington and Frederick Counties in Maryland. The prescriptions were for three drugs: Doriden, the trade name for glutethimide, a Schedule III controlled substance;[1] Tylenol 4,

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[1] Md. Code Ann., art. 27 § 279(c)b.2. (1986 Repl. Vol., 1991 Cum. supp.)

a Schedule III controlled substance containing codeine;[2] and penicillin.[3] Trooper ("Tpr.") David Hammel of the Drug Division Unit of the Narcotics Division of the Maryland State Police Department interrogated Firor, who claimed that he had previously managed to obtain these drugs on several occasions from a pharmacist in Greenbelt, Maryland who was later identified as the Petitioner, Keith Klingenstein.

On October 9, 1990, the police began an undercover "sting" operation designed to gather evidence against the Petitioner. The police first created forged prescription forms. Using forms of a Dr. Lugener of Baltimore, they glued a Washington, D.C. address from another prescription onto the Lugener form and then photocopied it.[4] The prescriptions were in the name of a Kim Firor. Tpr. Hammel and Tpr. Margaret Shank then went to Petitioner's

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[2] Codeine may be either a Schedule II, III or V drug. Tylenol 4 tablets are a combination of 300 mg. of the over-the-counter pain reliever acetaminophen and 60 mg. of codeine phosphate. *See* Physician's Desk Reference (*hereinafter* "PDR") at 1198 (1987 ed.). It is considered a Schedule III drug since it contains less than 90 mg. of codeine per dosage unit, i.e., per tablet. Art. 27 at § 279(c)d.2. Codeine is considered Schedule II only when sold by itself, generally in the form of codeine sulfate. *Id.* at § 279(b)a.1.vii. Here, the prescriptions in question were exclusively for Tylenol 4.

[3] Firor claimed that Doriden and Tylenol 4 when used in combination are known as a "max load", and produce an effect similar to heroin.

[4] No law prohibits filling prescriptions written out on photocopies of blank prescription forms. Maryland Health and Mental Hygiene regulations require that "prescriptions shall be written with ink or indelible pencil or typewriter and shall be manually signed by the practitioner." COMAR (Code of Maryland Regulations), Dept. of Health & Mental Hygiene, § 10.19.03.07(E)(1). The regulations thus prohibit the photocopying of the actual text of the prescription, but put no such restriction on how the form is printed.

business, Greenbelt Professional Pharmacy. Tpr. Shank attempted to have Petitioner fill prescriptions for Doriden, Tylenol 4, and penicillin written on the forged forms. Petitioner refused to fill the two Schedule III prescriptions indicating that he could not fill a Schedule III prescription written in the District of Columbia.[5] Tpr. Shank refused his offer to fill the prescription for penicillin.

The following day, Tpr. Hammel and an unnamed confidential informant ("CI") returned to Greenbelt Professional Pharmacy. Tpr. Hammel provided the CI with three forged prescriptions for Doriden, Tylenol 4 and penicillin, but these forms had another doctor's name and a Maryland address. The CI presented the forms to Petitioner and he filled them. The day after that, October 11, 1990, Tpr. Shank was also successful in having Petitioner fill forged prescriptions for Doriden and Tylenol 4. According to Tpr. Hammel's affidavit, he then contacted sources at the Maryland Department of Health and Mental Hygiene, who indicated that there had been a report of a recent burglary at Petitioner's store and that unspecified CDS had been stolen.

B. The search of the pharmacy.

On October 12, 1990, Tpr. Hammel drafted an affidavit and search warrant for Petitioner's pharmacy which was presented to Judge David Ross, Circuit Court Judge in Prince George's County, Maryland. In a paragraph preceding the command clause, the warrant reads:

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[5] According to the pertinent regulations:

(1) A prescription for a controlled dangerous substance may be issued only by an individual practitioner who is:

(a) Authorized to prescribe controlled dangerous substances in the State of Maryland, in which he is licensed to practice his profession. . . .

COMAR, Dept. of Health & Mental Hygiene, § 10.19.03.07(C)(1).

> I am satisfied that there is probable cause to believe that there is now being concealed certain property, namely "GLUTETHIMIDE", "CODEINE", AND "DORIDEN" on the person/s premises above described. . . . "

The command clause provided the police with the authority in pertinent part to:

> C. Open and search any safe, box, bag, compartment, or thing in nature thereof, found in or upon said premises or person/s;
>
> D. Seize all evidence, paraphernalia, controlled dangerous substances, and monies used in or incidental to the conduct or operation of controlled dangerous substance violations, found in or upon said premises, person/s. . . .

There was no specific command to seize documents.

After obtaining Judge Ross's signature on the warrant, Tpr. Hammel went to Petitioner's pharmacy and executed it. Tpr. Hammel was accompanied by Tprs. Martin, Jirsa and Kessler, and by Jack Freedman, a pharmacist and auditor from the Department of Health and Mental Hygiene. Tpr. Hammel testified that he believed, and Judge Martin ultimately held, that the broad language of the warrant when read together with the application and affidavit authorized *only* the seizure of Doriden, Tylenol 4, and penicillin and records relating to the filling of forged prescriptions for those substances.

After the search commenced, Mr. Freedman informed the police that Petitioner's pharmacist license was going to be suspended, although evidence at the hearing revealed that Petitioner's license was not actually suspended until November 15, 1990, over one month later. He directed the police to search for and seize Petitioner's pharmacist license and all Schedule II drugs which could be found. The officers proceeded to seize approximately eighty containers of pills including all Schedule II drugs

present,[6] as well as one container of Doriden, five containers of Tylenol with codeine,[7] and one of penicillin. An empty bottle and five unlabelled vials containing pills were also seized, even though the police, as Tpr. Hammel admitted, had no idea what the pills were.

In the five hours it took to search the 40' x 20' pharmacy, the police also seized over 16,000 prescriptions[8] and other documents, including as many of the following items which could be located: both filled and unfilled prescriptions, including every prescription written in the preceding two years; receipts; records, invoices, inventories, and order forms for Schedule II drugs; completed and uncompleted insurance forms and records; records of payment for CDS; daily purchase, sale, and accounting forms for the prior three years; tax returns since 1986, tax records, tax preparation materials, and blank tax forms; financial and bank records; records and receipts for credit cards and private charge accounts; pricing guides; check records and personal charge

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[6] Tpr. Hammel testified that they seized various quantities of Oxycodon, Roxicet, Percocet, Dexedrine, Percodan, Desoxyn, Methylphenicate with Hydrochloride, APC Compound with Codeine, Tylox, Mepheridine, Ritalin, Codeine Sulfate, Demerol, Dilaudid, Dolophine, Morphine, Opium Tinctunes, Leoodromoran, Nembutal Sodium, Seconal Sodium, MS Contin, Methadone, and Roxanol. They also seized a bottle of acetaminophen, which appears on neither Schedule II nor III.

[7] Not all of these items were Tylenol 4. The State's "Discovery Without Request" lists the seized items. Item 1 in the inventory is Tylenol 3, containing 300 mg. of acetaminophen and 30 mg. of codeine. *See* PDR at 1198. Item 3 was Tylenol 2, containing the same amount of acetaminophen but 15 mg. of codeine. *Id.* Item 11 lists three containers of Tylenol with Codeine, but gives no dosage information for the contents of any of the containers.

[8] In its indictment, the State alleged that Petitioner filled forged prescriptions on 15 occasions for Tylenol 4 and Doriden, for a total of only 30 prescriptions.

records; stenographic pads; other business licenses; store coupons and related records; other invoices; inventory records; prescription ledgers; accountant's reports; corporate records; a metal box; drug disposal forms; DEA forms; miscellaneous files from a front office; and personal papers.

The police also seized a total of $9,408 in U.S. currency from the cash register and other locations. The documents alone filled three large boxes which were wheeled into the courtroom during the hearing and which the judge examined in open court.[9]

C. The search of Klingenstein's residence.

Later on October 12, the police, using a form search warrant for marijuana, which relied in part on evidence seized at the pharmacy, obtained a search warrant for Petitioner's home. Although the police never took the word "marijuana" out of the warrant, the judge signed it and the police executed it. Miscellaneous items were seized, for which the evidentiary value was never established.

II. THE SUPPRESSION HEARING.

At the suppression hearing, counsel for Petitioner argued, *inter alia*, that the officers "flagrantly disregarded" the limitations in the warrant during execution, and that, as a result, total suppression was required under *United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978), and *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied sub nom. Hubbard v. United States*, 456 U.S. 926 (1982), and that the good faith exception did not save these searches. The State argued that evidence seized was

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[9] Tpr. Hammel claimed at the hearing that many of these items were seized pursuant to the command clause of the warrant under the rubric of "evidence", and that it was within his discretion to decide what to take.

within the scope of the warrant, and that any findings against the State on those issues should be cured by "good faith."

After hearing the argument, Judge Martin construed the scope of the warrant as follows: "[t]he Court further finds that the search warrant particularly read with the application authorized the seizure of Glutethimide, Codeline, Doriden, and Penicillin to the extent it may be there in unreasonable quantity as well as evidence of the filling of forged prescriptions for these items." Pet. App. at 64.

In light of that finding, the circuit court found that in executing the warrant, Tpr. Hammel and Freedman had greatly exceeded the scope of its authorization. The court stated that the persons executing the search warrant:

> particularly Trooper Hammel, did not reasonably rely or did not exercise good faith reliance upon any belief that those items other than Clutcthimide, Codeine, Doriden, Penicillin, evidence of forged prescriptions and evidence generally relating to those matters were permissibly subject to seizure under Judge Ross's search warrant.

Pet. App. at 65. The court reached this conclusion in light of the following facts and after having personally inspected the mass of seized materials during the hearing: Tpr. Hammel himself had prepared the warrant and affidavit, the specificity with which the drugs involved were identified in the application, the great length and intensity of the search, the excessive number of irrelevant documents seized, and Mr. Freedman's unilateral decision to order the seizure of items not covered by the warrant. Indeed, the court stated that "it is not a marginal question as to whether or not the warrant was executed properly." Pet. App. at 67.

Having found that "[t]he search was conducted in a general manner without regard to the limits of the search warrant," Pet. App. at 66, the court granted petitioner's motion to suppress all of the evidence seized from the pharmacy. The court then found that, since the issuance

of the second warrant was dependant both upon the written application and upon the communication to Judge Kelly of the result of the execution of the first warrant, all evidence obtained from Petitioner's residence must also be suppressed as "fruit of the poisonous tree." Pet. App. at 66-67.

III. THE STATE'S APPEAL.

The State then noted an interlocutory appeal of the suppression order to the Court of Special Appeals, pursuant to the Md. Code Ann., Courts and Judicial Proceedings § 12-302(c)(3), and all further proceedings were stayed pending the outcome of the appeal. In its brief, the State contended that all of the evidence seized from the pharmacy fell within the scope of the warrant's command clause, and advanced in the alternative for the first time, that even if some of the seized items were not specified by the warrant, total suppression was unjustified. As to the second warrant, the State also claimed for the first time that the lower court erred by failing to consider properly the application of *Franks v. Delaware*, 438 U.S. 154 (1978), and whether there was independent untainted probable cause to support the warrant for the search of the home.

In its opinion, the intermediate appellate court vacated the order suppressing all the evidence seized under the warrants. *Klingenstein*, 608 A.2d at 808, 810. The Court of Special Appeals agreed that a scope violation had indeed occurred during the search of the pharmacy. *Id.* at 799-800. However, it disagreed with the circuit court's finding that the execution rose to the level of flagrant disregard. *Id.* The Court of Special Appeals did not mention that Judge Martin had explicitly found that the search and seizure were not carried out in reasonable good faith reliance on the limitations of the warrant.

In determining whether particularized or plenary suppression was the appropriate remedy, the court surveyed the cases from other jurisdictions holding that total suppression may be imposed where the police "flagrantly

disregard" the limitations of the warrant. *Id.* at 799-807. It concluded that the distinction is "between dominant purposes – between 1) seizures beyond the warrant's command attributable to honest mistake, excessive zeal, or even spontaneous opportunism, on the one hand, and 2) seizures beyond the warrant's command actually anticipated and intended by the searching officer, on the other." *Id.* at 807. Since the appellate court held that only those items seized which were clearly outside the scope of the warrant must be suppressed, it remanded for the lower court to decide which items were properly seized. *Id.* at 808.

IV. PETITIONER'S APPEAL TO THE COURT OF APPEALS

The Court of Appeals of Maryland granted certiorari on November 17, 1992. The court's opinion was issued on May 14, 1993. The court rejected the flagrant disregard doctrine and remanded to the hearing judge (1) to determine which items seized in the pharmacy were within the terms of the warrant and which items were beyond the scope of the warrant and (2) to make further findings with respect to the home warrant. *Klingenstein v. State*, 624 A.2d at 533. The hearing judge was directed to deny the motion to suppress as to which items were constitutionally seized and grant the motion to suppress only as to those items which were seized beyond the terms of the warrant. *Id.* at 539.

In its opinion, the Court of Appeals, contrary to the Court of Special Appeals, stated that the flagrant disregard exception was not recognized in Maryland. *Id.* at 535. This opinion "surveyed" the federal circuits and "some state appellate courts" and determined that the federal courts have consistently held that the seizure of items outside the scope of the warrant will not ordinarily affect the admissibility of items properly seized. *Id.* at 536. The court also found that the state appellate courts were in "complete harmony" with the general rule. *Id.*

The court concluded that "it appears to be universally recognized" that under the Fourth Amendment the exclusionary rule does not act to suppress evidence seized within the scope of a warrant simply because evidence outside the scope of a warrant was unlawfully seized. *Id.* Although he admitted that courts in other jurisdictions have discussed the exception, he focused his attention on only two cases where the flagrant disregard concept was applied to suppress all of the fruits of a search, *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988) and *Florida v. Johnson*, 605 So.2d 545 (Fla. Dist. Ct. App. 1992). *Id.* at 537.

Despite the controversy within the federal circuits and state courts, and despite the fact that most circuits, as well as several states, have conceded the legitimacy of the flagrant disregard exception, the court concluded that because the Supreme Court of the United States has not made a ruling regarding this concept, then the Court of Appeals of Maryland would avoid doing so as well. *Id.*

Thus, the Court of Appeals of Maryland, in specifically addressing the Supreme Court of the United States, as well as Petitioner's Writ of Certiorari, has opened the door for the Supreme Court to lay to rest once and for all the controversy that exists within and among the circuits and states as to whether the flagrant disregard concept should be recognized, thereby preserving the sanctity of the Fourth Amendment by upholding its Constitutional protection while simultaneously eliminating the vagueness and confusion that have permeated its sacred tenets.

REASONS FOR GRANTING THE WRIT

A. THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE TOTAL SUPPRESSION OF EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT WHEN THE OFFICERS FLAGRANTLY DISREGARD ITS TERMS DURING EXECUTION. BECAUSE A DIRECT AND ACKNOWLEDGED CONFLICT EXISTS AMONG AND WITHIN THE CIRCUITS AND STATES OVER THE CONCEPT OF "FLAGRANT DISREGARD", GUIDANCE FROM THIS COURT IS NEEDED.

The utter chaos and confusion surrounding the concept of "flagrant disregard" within and among the federal circuits and state courts is apparent. The courts are in disarray, with no consensus as to whether the "flagrant disregard" concept is a valid exception to the general warrant rule. The following analysis will trace the history and evolution of the flagrant disregard rule, as well as explain the dissention among the federal circuits.

United States v. Rettig, 589 F.2d 418 (9th Cir. 1978), authored by then-Judge, now Justice, Kennedy, is the seminal case on "flagrant disregard", and established that when officers flagrantly disregard the scope set out in a search warrant, all items seized in the search, whether in or outside the scope set in the warrant, must be suppressed.[10]

The rationale underlying this concept is that "when investigators fail to limit themselves to the particulars in the warrant, *both* the particularity requirement and the probable cause requirement of the Fourth Amendment are drained of all significance as restraining mechanisms,

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[10] It should be noted that although *Rettig* does not actually use the term "flagrant disregard", the term was coined a few years later by the D.C. Circuit in *United States v. Heldt*, 668 F.2d 1238, 1259 (1981) and has been widely adopted in both federal and state courts.

and the warrant limitation becomes a practical nullity." *United States v. Heldt*, 668 F.2d 1238, 1257 (D.C. Cir. 1981) (emphasis in original).

Specifically, *Rettig* involved the execution by DEA agents of an arrest warrant for cocaine importation of the defendant's home. *Id.* at 420. The agents had also applied for a search warrant for evidence, but the federal magistrate refused to issue one since the allegations of probable cause for the search was based on stale information. *Id.* Before executing the warrant, the agents called Rettig to tip him off anonymously that they were coming for him. *Id.* They hoped that Rettig would flee the house in possession of incriminating items related to the cocaine charge for which the agents had failed to obtain the search warrant. *Id.* When the agents entered the house to make the arrest, they found Rettig flushing a pound of marijuana down the toilet. *Id.*

The agents then obtained a search warrant for the house from a state court judge based on the marijuana. *Id.* The affidavit, however, neglected to mention the denial of request for a search warrant the previous day and the agents' intention to search for evidence relating to the cocaine conspiracy. *Id.* The search of the house by five or six agents lasted up to five and one-half hours. *Id.* Among the 2,288 items seized were U.S. government publications, blank credit card applications, bank brochures, medical and dental records, drug store receipts for the prior two years, slides, undeveloped film, extensive financial records, credit cards and travel documents, a black leather case containing four pounds of white powder, a scale, and several wine bottles. *Id.* at 421.

Judge Kennedy, writing for a unanimous panel, concluded that:

> the agents did not confine their search in good faith to the objects of the warrant, and that while purporting to execute it, they substantially exceeded any reasonable interpretation of its provisions. As interpreted and executed by the agents, this warrant became an instrument

> for conducting a general search. Under the circumstances, it is not possible for the court to identify after the fact the discrete items of evidence which would have been discovered had the agents kept their search within the bounds permitted by the warrant; and therefore all evidence seized during the search must be suppressed. *Id.* at 423.

In *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988), the Tenth Circuit also ruled that blanket suppression was required. In this particular case, a county police officer received a tip from an informant that the defendant was illegally dealing in firearms. *Id.* at 1195. The same informant had previously told the officer that Medlin was in possession of certain stolen goods. *Id.* at 1195. With the county officer's help, federal agents obtained and executed a warrant to search for the guns. *Id.* While the agents were seizing 130 firearms and related evidence, the county policeman seized 667 items which he believed to be stolen. *Id.* at 1195-96. Those items were loaded into a horse trailer by both the state and federal officers and carted away. *Id.*

After the Tenth Circuit had remanded the case for a hearing on the issue of flagrant disregard, the trial court specifically found that the seizure of the 667 items not specified in the warrant "was not mitigated by practical considerations" and that the county policeman "employed the execution of the federal search warrant as a 'fishing expedition.' " *Id.* at 1199. In light of this, the appeals court upheld the total suppression of all evidence, including the firearms, seized during the general search since it "could not say that these factual findings are clearly erroneous." *Id.*

Florida v. Johnson, 605 So.2d 545 (Fla. Dist. Ct. App. 1992), is the most recent instance where total suppression was granted and upheld. The police in that case obtained a warrant to search the defendant's home for pornographic video tapes which he was selling by mail. *Id.* at 546. The supporting affidavit contained descriptions and

still photographs of scenes from a sample tape which the police had obtained from the defendant, and a description of other available tapes, which were listed in brochures accompanying the shipment of the sample tape. *Id.* In executing the warrant for the specified material, however, the police brought along videocassette recorders and televisions and watched numerous other tapes located on the premises, seizing all copies of those they determined to be obscene. *Id.* at 546-47. They also seized a huge amount of office and electronic equipment, which seizures Johnson testified "wiped . . . out" his business. *Id.* at 547.[11]

The Florida District Court of Appeals, relying largely on *Medlin, Rettig,* and *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979),[12] sustained the trial court's finding of flagrant disregard and suppression of all evidence seized. *Id.* at 548. The appeals court agreed that the police had executed the warrant in a general manner by using their own discretion in determining which tapes to seize rather than seizing only those specifically encompassed by the warrant, and by effectively shutting down Johnson's business

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[11] Just as in *Johnson,* where the illicit search and seizures conducted outside the scope of the warrant wiped out the business of the Plaintiff, so to did the indiscriminate search and seizure conducted under the guise of the warrant issued to take Doriden, Tylenol 4, and Penicillin all but wipe out the Petitioner's business in the present case.

[12] The Town Justice in this case accompanied the officers to an adult book store to determine "independently" if items in the store were in violation of the law, and then granted an open-ended warrant. The Supreme Court held that 1) the Fourth Amendment did not leave entirely to the officials conducting the search to determine which items were obscene, 2) the Town Justice did not manifest neutrality, and 3) the store owner had a legitimate expectation of privacy. Just as in *Lo-Ji Sales,* the officials, following the auditor Jack Freedman, also used their discretion to determine which drugs to seize.

by illegally seizing the office and electronic equipment. *Id.*

However, despite the history and evolution of the flagrant disregard concept within the federal and state courts, there has been little consistency and agreement as to whether this concept should be recognized. Indeed, the dispute within the Maryland court system itself is indicative of the dissention and controversy that surrounds this newly coined concept. As outlined in the opinion section, *supra*, the circuit court granted total suppression of evidence based on the flagrant disregard concept. The Court of Special Appeals of Maryland, while agreeing that the flagrant disregard exception was a valid legal concept, determined that the officers did not flagrantly disregard the warrant in this case. *State v. Klingenstein*, 608 A.2d at 807-08. Specifically, the Court of Special Appeals held that in order to "flagrantly disregard" a warrant, the officers must use the warrant as a pretext for an illicit search. *Id.* The court held this even though none of the authority quoted on flagrant disregard ever established a "pretext" standard.

Nevertheless, the Court of Appeals stated that the State of Maryland does not recognize the flagrant disregard concept at all, and proceeded to selectively survey the jurisdictions, concluding that most jurisdictions did not recognize it either. *Klingenstein v. State*, 624 A.2d at 535-37. Clearly, courts within the same jurisdiction are not clear as to whether the flagrant disregard concept has been adopted or not, and when to abide by this exception. Moreover, many are reluctant to abide by this concept until directed to do so by the Supreme Court, as clearly stated by Judge Orth in the court's opinion. *Id.* at 537.

Specifically, as noted above, the Ninth Circuit, as per then-Judge (now Justice) Kennedy in *Rettig* and the Tenth Circuit in *Medlin* as well as the Florida Court in *Johnson* have upheld the validity of the flagrant disregard concept. Similarly, the District of Columbia Circuit has recognized the flagrant disregard concept in *Heldt*, and the

Eastern District of Virginia in the Fourth Circuit has recognized this concept in *United States v. Belcher*, 577 F. Supp. 1241, 1253-54 (E.D. Va. 1983).[13] The Eleventh Circuit, in *United States v. Wuagneux*, 683 F.2d 1343, 1346 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983), has also noted the validity of the flagrant disregard exception.[14]

However, even within these circuits, which have recognized "flagrant disregard," there appears to be confusion over what is the applicable standard, since many cases within these jurisdictions have recognized *Rettig* but nevertheless have made a conscientious effort to distinguish themselves from its unique facts and circumstances. For instance, in the District of Columbia Circuit, in *In Re Search Warrant Dated July 4, 1977*, 667 F.2d 117 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982), although the district court held that the search of the Church of Scientology by F.B.I. agents constituted a general search, the United States Court of Appeals held that although there *were* items seized outside the scope of the warrant, the items seized "were not illegal" and the court held that

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[13] In *Belcher*, the defendant was charged with criminally setting fire to a restaurant in Virginia. The defendant was a known "bookie" who had been practicing his trade in the Colonial Heights Area for over a decade. However, after the fire, police suspected defendant of arson and issued a warrant to search for gambling paraphernalia. The Court concluded that such a warrant was simply a pretext for searching for arson evidence, and suppressed all evidence found in the search. *Id.* at 1246.

[14] In *Wuagneux*, the defendant was convicted of operating a business through a pattern of racketeering activity, embezzlement of funds from an employee welfare benefit plan, bank fraud, and filing false income tax returns. Although the Court held that the search of the defendant's records was proper in this instance the court specifically stated that "absent a 'flagrant disregard' of the terms of the warrant, the seizure of items outside the scope of a warrant will not affect admissibility of items properly seized." *Id.* at 1354.

the Church was entitled only to the return of the documents, and not general suppression of all the evidence as called for by the flagrant disregard concept when the officers flagrantly violate the scope of the search as called for in the warrant. *Id.* at 119. The court did recognize that in some "rare" cases a disregard for specific restrictions on a warrant may turn an otherwise lawful search into a general one, calling for total suppression of all items seized. *Id.* at 130. Nevertheless, not all items seized were suppressed in this case. *Id.*

Another example, occurring in the Fourth Circuit, is *United States v. Fawole*, 785 F.2d 1141 (4th Cir. 1986). In this case, the defendant was suspected of practicing insurance fraud and a warrant was issued to find evidence of such fraud. *Id.* at 1143. However, many documents and appliances were taken, including a briefcase full of papers that was later inventoried at the police station. *Id.* at 1144. Among the items in the briefcase were two forged passports. *Id.* at 1143. Despite the fact that the passports were technically outside the scope of the warrant and despite the fact that inaccuracies were found within the affidavit supporting the warrant, the evidence seized was not suppressed as the court held that the discovery of the passport allows the warrantless seizure under the plain view doctrine, and distinguishing the seizure from the flagrant disregard doctrine. *Id.* at 1147.

In the Ninth Circuit, the birthplace of *Rettig*, there still remains vagueness and confusion as to how to apply the flagrant disregard doctrine. On the one hand, many courts have followed *Rettig*. *See United States v. Chen*, 979 F.2d 714, 717 (9th Cir. 1992); *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982). Nevertheless, in *United States v. Perdomo*, 800 F.2d 916 (9th Cir. 1986), the defendant was convicted of cocaine possession. *Id.* A warrant was issued to search his residence and even though the court found that certain documents seized did not relate to drug trafficking (they were classified as religious documents), the Court of Appeals nevertheless suppressed only those documents, while admitting the documents found within

the scope of the warrant. *Id.* at 920. *See also United States v. Beusch*, 596 F.2d 871, 876 (9th Cir. 1979) (holding that seizure of items outside the scope of the warrant will not ordinarily affect the admissibility of items properly seized.)

Conversely, the Second, Third, Fifth and Sixth Circuits have not fully recognized the flagrant disregard concept. For example, Judge Orth in the Maryland Court of Appeals, while ignoring the above cited cases, (except for *Medlin* and *Johnson*), selectively "surveyed" the Circuits and stated that "the federal courts have consistently held that the seizure of items outside the scope of the warrant will not ordinarily affect the admissibility of items properly seized". *Klingenstein v. State*, 624 A.2d at 536. As support, Judge Orth listed *United States v. Artieri*, 491 F.2d 440, 446 (2d Cir. 1974), *cert. denied*, 419 U.S. 878 (1974); *United States v. Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977); *Beusch, supra; Premises Known as 1007 Morningside*, 625 F. Supp. 1343, 1350 (N.D. Iowa 1985); *Watts v. Kroczynski*, 636 F. Supp. 792, 801 (W.D. La. 1986); *Huebner v. United States*, 731 F. Supp. 1441, 1446 (D. Ariz. 1990). *Id.* at 536.

Though Judge Orth did not refer to these cases, other federal courts support the above proposition that items seized outside the warrant will not affect the admissibility of properly seized items. *See Brooks v. United States*, 416 F.2d 1044 (5th Cir. 1969); *Superior Fish Co., Inc. v. Royal Globe Ins. Co.*, 521 F. Supp. 434 (S.D.N.Y. 1981).

Judge Orth also "sampled" the opinions of state appellate courts, and stated that "they are in complete harmony with the general rule". *Klingenstein v. State*, 624 A.2d at 536. Judge Orth relied on *State v. Romero*, 660 P.2d 715, 717 (Utah 1983); *State v. Monsrud*, 337 N.W.2d 652, 661 (Minn. 1983); *Commonwealth v. Lett*, 470 N.E.2d 110, 113-114 (Mass. 1984); *State v. Riedinger*, 374 N.W.2d 866, 872 (N.D. 1985); *New Hampshire v. Valenzuela*, 536 A.2d 1252, 1267 (N.H. 1987) (where Justice Souter, then of the Supreme Court of New Hampshire, stated that "the appropriate sanction for a scope violation in the course of

a warranted search is, with the exception of the rare and outrageous case where the entire execution of the warrant can be deemed either a subterfuge or a farce . . . [is a] particularized, rather than plenary, suppression"). *Id.* at 536.

However, other states not "sampled" by Judge Orth have recognized *Rettig* and the flagrant disregard doctrine. *See Smith v. Whitehead*, 436 A.2d 339, 346 (D.C. App. 1981), *aff'd*, 458 A.2d 738 (D.C. 1983); *People v. Rogers*, 187 Cal. App. 3d 1001, 1008 (1986); *Wisconsin v. Noll*, 343 N.W.2d 391, 399 (Wis. 1984).

Finally, the Court of Special Appeals, though largely ignored by Judge Orth, relied on a wealth of authority to support the flagrant disregard concept. Among the cases cited by the Court of Special Appeals are *United States v. Lambert*, 887 F.2d 1568 (11th Cir. 1989); *United States v. Young*, 877 F.2d 1099 (1st Cir. 1989); *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988); *United States v. Matias*, 836 F.2d 744 (2d Cir. 1988); *Marvin v. United States*, 732 F.2d 669 (8th Cir. 1984); *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983); *United States v. Tamura*, 694 F.2d 591; *Wuagneux*, 683 F.2d 1343; *Heldt*, 668 F.2d 1238; *Rettig*, 589 F.2d 418; and *New Hampshire v. Valenzuela*, 536 A.2d 1252 (N.H. 1987).

More recent decisions also approving the flagrant disregard doctrine which were not cited in the opinion include *New Hampshire v. Tucker*, 575 A.2d 810 (N.H. 1990) and *Wisconsin v. Petrone*, 468 N.W.2d 676 (Wis. 1991).

Lastly, as emphasized by Judge Orth in the court's opinion, although the Supreme Court has never directly approved the flagrant disregard concept, the Supreme Court has cursorily addressed it in *Waller v. Georgia*, 467 U.S. 39, 43-44, n.3 (1984). *Klingenstein v. State*, 624 A.2d at 537. Within this footnote, the court specifically stated that

> the Petitioners do not assert that the officers exceeded the scope of the warrant in the places *searched*. Rather, they say only that the police unlawfully seized and took away items unconnected to the prosecution. The Georgia Supreme

> Court found that all items that were unlawfully seized were suppressed. In these circumstances, there is certainly no requirement that lawfully seized evidence be suppressed as well.

Id. (emphasis added) (quoting *Waller*, 467 U.S. at 43-44, n.3). Thus *Waller* implied that the flagrant disregard exception may apply where, as here, the *search* is conducted in a general manner. Many of the cases cited above which recognize flagrant disregard post-date *Waller*.[15]

As illustrated above, the law surrounding the flagrant disregard doctrine is in a state of chaos. A dichotomy exists between the states and circuits that hold, on the one hand, evidence seized outside of the warrant should be suppressed but should not affect the admissibility of the evidence seized within the scope set by the warrant, and on the other hand, all evidence seized in flagrant disregard of the warrant should be suppressed. There is also confusion as to how to define flagrant disregard and when a search turns a warrant into a

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[15] However, it is important to note that the facts and circumstances surrounding *Waller* are different than the case at hand. Specifically, in the present case not only did the police unlawfully seize items, but they also did not confine their *search* to the scope of the warrant, in contrast to the case above. Precisely, the search issued for Petitioner's business was limited to Doriden, Tylenol 4, and penicillin, as well as records relating to the filling of forged prescriptions for those substances. As stated, many drugs and items not listed on the warrant were also searched and seized. Thus, in the present case, the warrant was a guise to enter the pharmacy and grab whatever the officers and pharmacist/auditor desired to take at the time, including Petitioner's pharmacist license, Schedule II drugs not listed on the warrant, files and personal papers. *Id.* Clearly, the officers exceeded the scope of the search warrant in this case. Just as the warrant issued in *Rettig* was a guise to enter and search for items not listed on the warrant, so did the warrant become a guise on the court in this case, calling for the suppression of all items seized.

"general" warrant, as demonstrated by the holding of the Maryland Court of Special Appeals. Thus, given the state of the law within and among the states and circuits, clarification by the Supreme Court, as to whether the flagrant disregard exception exists and what its precise application should be, would be welcome and needed guidance.

B. THE FLAGRANT DISREGARD CONCEPT MUST BE RECOGNIZED IN ORDER TO PRESERVE THE SANCTITY OF THE FOURTH AMENDMENT; OTHERWISE THE PROTECTION AGAINST GENERAL SEARCHES AND SEIZURES BECOMES MEANINGLESS.

The Fourth Amendment is plainly concerned with protection against unreasonable searches and seizures and that no warrants be issued without probable cause and describing the items to be seized with particularity.

In discussing the warrant requirement of the Fourth Amendment, the United States Court of Appeals for the District of Columbia Circuit explained that "[t]he right to be free from unreasonably broad searches is distinct from those rights which concern a warrant's validity." *Heldt*, 668 F.2d at 1260 n.24. This prohibition on "general" searches in Anglo-American jurisprudence pre-dates the independence of the thirteen Colonies. For example, Lord Mansfield wrote that "[i]t is not fit that the receiving or judging of the information [in a warrant] should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officers." *Leach v. Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765) (*quoted in United States v. United States District Court*, 407 U.S. 297, 316 (1972)). The Framers had in mind protecting against this precise evil when they drafted the Fourth Amendment. *See Stanford v. Texas*, 279 U.S. 476,

481-82 (1965).[16] Indeed, Judge Wald wrote in *Heldt* that "obedience to the particularity requirement both in drafting and executing a search warrant is therefore essential to protect against the centuries-old fear of general searches and seizures." *Heldt*, 668 F.2d at 1257.

The twin requirements that the warrant be particular in identifying what is to be seized, and that it be executed according to those limitations, are part and parcel of the fundamental duty of police to obtain a warrant before conducting a search.[17] In *Payton v. New York*, 445 U.S. 573, 584 n.23 (1980) (*quoting* N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 103 (1937)), the Supreme Court noted:

> [t]hat the prohibition against "unreasonable searches" was intended, accordingly, to cover something other than the form of the warrant, is a question no longer left to implication to be derived from the phraseology of the [Fourth] Amendment.

The classic expression of the particularity requirement comes from *Marron v. United States*, 275 U.S. 192 (1927), where Justice Butler wrote:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken,

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[16] Indeed, in *Stanford*, Justice Douglas described the history of the battle with the Crown and the fear of the English Writs of Assistance. It was the battle for "individual liberty and privacy" which finally defeated the validity of the "general" warrants in the landmark cases of *Wilkes v. Wood*, How. St. Tr. 1153 (1763) and *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). *Id.* at 483.

[17] Justice Brennan wrote in *Miller v. United States*, 357 U.S. 301, 313 (1958) that "every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."

> nothing is left to the discretion of the officer executing the warrant.

Id. at 196. Thus, even if a court finds that a warrant was properly issued upon probable cause and that it reasonably particularized the object of the search and seizure, evidence seized may nonetheless be rendered inadmissible if the execution was improper, i.e., the search exceeded the scope and intensity allowed by the warrant. *See e.g., Andresen v. Maryland*, 427 U.S. 463 (1976); *Smith v. State*, 365 A.2d 53 (1976). *See also Terry v. Ohio*, 392 U.S. 1, 17-18 (1968).

In cases, as here, where the police are found to have acted in flagrant disregard of the particularity requirement in executing the warrant, the remedy should not simply be suppression of the evidence seized which was not specified in the warrant, but rather the suppression of all evidence seized in the search. *Rettig*, 589 F.2d at 423; *Medlin*, 842 F.2d at 1198-99; *Heldt*, 668 F.2d at 1238; *Johnson*, 605 So. 2d 545. The rationale underlying this is that "[w]hen investigators fail to limit themselves to the particulars in the warrant, *both* the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity." *Heldt*, 668 F.2d at 1257 (emphasis in original).

The cases of *Rettig, Medlin, Johnson* and *Lo-Ji Sales, Inc. v. New York*, and many of the other cases set forth above, all agree that "flagrant disregard" of the terms of the warrant in its execution can turn a valid search into a general one, and thus call for total suppression of the evidence seized.

In essence, without total suppression, the protection provided by the Fourth Amendment become meaningless. The incentives to abide by its requirements disappear when officers know that at most, the evidence seized outside the warrant will be suppressed, but that evidence deemed to be "within" the warrant will still be admitted. This encourages hit or miss strategies, rather than careful attention to the terms of the warrant, since the officers

will have lost little or nothing in their general search when at least part of the evidence gathered will still be admitted. The age old fear of general searches will return, and the requirement of particularity will fall by the wayside if officers are allowed to seize any items and then have a judge later adjudicate as to which items belong in court, and which do not. To the extent the Fourth Amendment protects privacy in the home, this protection would be severely diminished by the failure to apply appropriate sanctions to severe violations. Put simply, warrant limitations will become meaningless. The flagrant disregard concept must be recognized and defined by this Court to give full effect to the Fourth Amendment.

C. THE SEARCHING OFFICERS FLAGRANTLY DISREGARDED THE PHARMACY WARRANT'S LIMITATIONS DURING ITS EXECUTION, AND THE CIRCUIT COURT'S FACTUAL FINDINGS WERE PROPER AND MUST BE UPHELD.

The Circuit Court held that the search warrant, when read together with the application and affidavit for Petitioner's pharmacy, only permitted a limited search for Doriden (glutethimide), Tylenol 4 (containing codeine), and penicillin, and records related to the filling of forged prescriptions for those drugs. No evidence was presented at the hearing which could have given rise to probable cause for the seizure of anything other than these items. For the overwhelming bulk of the evidence taken, there simply existed no "nexus . . . between the item seized and criminal behavior." *Hughes v. State*, 287 A.2d 299, 308 (Md. 1972).[18]

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[18] The State did not contend at either the suppression hearing or in its brief to the Court of Special Appeals that the plain view exception to the Warrant Clause had any bearing on the resolution of the issues in this case. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Horton v. California*, 496 U.S. 128 (1990).

The search in the instant case was remarkably similar to the search condemned by the Tenth Circuit in *Medlin*, as described in Argument I, *supra*. Like the deputy sheriff in *Medlin*, the auditor from the Maryland Board of Pharmacy pursuant to his own objectives accompanied the officers and directed the search for and seizure of numerous items not reasonably within the scope of the warrant. No disinterested judicial officer participated in making the decision to seize the 667 items of allegedly stolen property in *Medlin*, or, as in the present case, the Schedule II drugs and mass of other items not embraced by the warrant's language.[19] Rather, the police here undertook the intense, sweeping, five-hour search and seizure well beyond the scope of the warrant pursuant only to Mr. Freedman's invocation of executive authority.[20] As in *Rettig*, with respect to the vast majority of items seized, there is no way to distinguish between the items legally and illegally searched for and seized.

Significantly, Tpr. Hammel, the warrant's drafter who specializes in drug cases involving pharmacists, testified

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Since the burden was on the State to raise the issue, *Coolidge*, 403 U.S. at 455, the Court of Special Appeals properly declined to address it. *Klingenstein*, 92 Md. App. at 337, 608 A.2d at 798. *See* Maryland Rule 8-131(a).

[19] The neutral and detached magistrate requirement of the Fourth Amendment works in tandem with the particularity requirement to insure that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 195; *Johnson v. United States*, 333 U.S. 10, 14 (1948).

[20] Mr. Freedman's "order" to the officers during the search to seize all the Schedule II drugs and other evidence not specified in the warrant was reminiscent of the conduct condemned in *Lo-Ji Sales, Inc.*, where a magistrate accompanied officers executing a warrant and told them what items to seize, but with two significant distinctions. First, Mr. Freedman is not a judge, and second, the criminal or evidentiary nature of the vast amount of materials taken was never established.

that he knew both that it was not illegal for Schedule II drugs to be in a duly licensed pharmacy, and that the warrant did not permit the seizure of the Schedule II drugs. Yet, he nonetheless acceded to Mr. Freedman's, rather than the judge's, determination of what was to be seized. Indeed, the unauthorized seizure and purported suspension of Petitioner's pharmacy license by Mr. Freedman are emblematic of the utter disregard displayed in carrying out the search.

The case of *Florida v. Johnson*, 605 So.2d 545, also further buttresses the soundness of the trial court's decision resulting from the suppression hearing. The fatal flaws in the search found by the court in that case, i.e., the execution of the warrant in a general manner and the officers' exercise of unbridled discretion in determining what to seize, are strikingly similar to those which infected the search of Petitioner's pharmacy. That case also highlights another egregious abuse of the warrant by police here: treating the warrant as not simply authorization to search for and seize innumerable unspecified items, but as a license to force Petitioner out of business. It certainly can be inferred that the comprehensive nature of the searches and seizures and the unauthorized confiscation of all the business licenses substantially impaired Petitioner's ability to run the pharmacy.

Faced with the manner of execution, the fact that the State never demonstrated how the vast array of documents and drugs came within the purview of the warrant, and the fact that Petitioner's business had for all intents and purposes been summarily "wiped out", the circuit court thus properly found, as did the courts in *Rettig*, *Medlin* and *Johnson*, that the warrant had been executed in bad faith and in flagrant disregard[21] for its terms by

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[21] The State claimed in its Opposition to the Petition for a Writ of Certiorari to the Maryland Court of Appeals that the circuit court never actually made a finding of "flagrant disregard." While it is true that the circuit court in its opinion grant-

the executing officers. As a result, the court properly suppressed all of the evidence seized at Petitioner's pharmacy.

CONCLUSION

In light of the facts and circumstances present in this case, the police flagrantly disregarded the limitations of the search warrant for the pharmacy. In order to preserve the sanctity and nobility of the Fourth Amendment, the flagrant disregard concept must be uniformly recognized and consistently applied throughout the states and circuits.

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ing total suppression did not actually utter the words "flagrant disregard", it is clear both from the context of the opinion in relation to Petitioner's argument, which was explicitly based on flagrant disregard, and from the circuit court's comments that "the search was conducted in a general manner without regards to the limits of the warrant," and that it was "not a marginal question as to whether or not the warrant was executed properly", that the circuit court did in fact base its ruling on a finding of flagrant disregard.

For the foregoing reasons, Petitioner requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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September 9, 1993

330 Md. 402

Keith Gordon KLINGENSTEIN

v.

STATE of Maryland.

No. 97, Sept. Term, 1992.

Court of Appeals of Maryland.

May 14, 1993.

In prosecution of registered pharmacist for maintaining common nuisance and multiple instances of distribution of controlled dangerous substances and other offenses, defendant moved to suppress all fruits of search of his pharmacy and his home. The Circuit Court, Prince George's County, Larnzell Martin, Jr., J., granted suppression motion. State appealed. The Court of Special Appeals, 92 Md.App. 325, 608 A.2d 792, vacated and remanded. Defendant's petition for writ of certiorari was granted. The Court of Appeals, Charles E. Orth, Jr., Associate Judge of the Court of Appeals (retired), Specially Assigned, held that (1) seizure of items outside scope of search warrant for defendant's business did not affect admissibility of items properly seized, even if there was "flagrant disregard" of warrant's terms; (2) although presence of tainted information in application for warrant to search defendant's home did not necessarily render the warrant unconstitutional, culling of tainted information and determination of whether remaining untainted information was adequate to show probable cause was matter for hearing judge in the first instance; and (3) if hearing judge determined that issuance of home warrant met constitutional guarantee of probable cause, he was to

then determine, under particularity clause, which items seized were within terms of warrant and which were beyond its scope.

Affirmed in part, reversed in part, and remanded.

Fred R. Joseph, Joseph, Greenwald & Laake, P.A., and Leonard R. Stamm, Goldstein & Stamm, P.A., all on brief, Greenbelt, for petitioner.

Mary Ellen Barbera, Asst. Atty. Gen. and J. Joseph Curran, Jr., Atty. Gen., both on brief, Baltimore, for respondent.

Argued before ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW, KARWACKI and ROBERT M. BELL, JJ., and CHARLES E. ORTH, Jr., Judge of Court of Appeals (Retired, Specially Assigned).

CHARLES E. ORTH, Jr., Judge, Specially Assigned.

I

A fifty-four count indictment charging Keith Gordon Klingenstein, a registered pharmacist, with various violations of the Maryland Controlled Dangerous Substances laws and related offenses awaits trial in the Circuit Court for Prince George's County. The indictment was returned by the Grand Jury as a result of evidence seized by the Maryland State Police in a search of a pharmacy owned and operated by Klingenstein, and in a search of his home. Each search was under the color of a warrant duly obtained by the police to meet the constitutional guarantees against unreasonable searches and seizures.

In 1789 the first ten amendments to the Constitution of the United States, known as the Bill of Rights, were proposed by Congress and declared ratified in 1791. The Fourth Amendment guaranteed:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .

See McMillian v. State, 325 Md. 272, 281-282, 600 A.2d 430 (1992). The guarantee was assured by two clauses of the Amendment. The first clause commanded that

> no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . .

The second clause required that the warrant

> particularly describ[e] the place to be searched, and the persons or things to be seized.

II

A

The reason the indictment against Klingenstein has not come to trial is that he filed a pre-trial motion to suppress all of the fruits of the search of his place of business and of his home. Upon a plenary hearing, the Circuit Court for Prince George's County granted his motion. The State appealed. The Court of Special Appeals vacated the suppression order and remanded the case for further proceedings. *State v. Klingenstein*, 92 Md. App. 325, 608 A.2d 792 (1992). We granted Klingenstein's petition for a writ of certiorari.

B

Klingenstein's pharmacy was located at 6201 Greenbelt Road, Greenbelt, Maryland. He lived at 9115 49th Place, College Park, Maryland. On 12 October 1990, a Trooper of the Maryland State Police obtained a warrant to search Klingenstein's pharmacy (the business warrant), and later that day another Trooper obtained a warrant to search the home (the home warrant). As we shall see, the business warrant was a proper warrant; the home warrant raised questions as to the constitutionality of its issuance.

The judge hearing the motion to suppress was satisfied that the business warrant did not offend the Fourth Amendment – it was supported by oath and particularly described the place to be search [sic] and the things to be seized. The "things to be seized" were expressly set out "GLUTETHIMIDE" and "CODEINE," each a controlled dangerous substance, "DORIDEN," the trade name for Glutethimide, and false or forged prescriptions for those drugs. The judge found that the affidavit was sufficient to show probable cause to believe that the designated drugs were being "concealed" on the premises, as well as "evidence of the filling of forged prescriptions for these items." Klingenstein does not question that there was probable cause to support the issuance of the business warrant and that it was valid on its face. But he disputes the constitutionality of the seizures made pursuant to it, claiming that items were seized that were not particularly described in the warrant. In other words, there was a scope violation in the execution of the warrant.

It was adduced at the hearing that the police officers serving the warrant and conducting the search were accompanied by one Jack Freedman, who was a pharmacist and an auditor with the Drug Control Division of the State Department of Health and Mental Hygiene. It was not disputed that Freedman expressed his intention to have Klingenstein's pharmacist license suspended, and to that end instructed the officers to seize *all* drugs listed in Schedule II of the Controlled Dangerous Substances laws. The officers did so. The judge noted that although the officer who applied for the warrant was "careful . . . to specify particular drugs," he "relied upon the direction of Mr. Freedman, not any belief as to the scope of the warrant being greater than that expressed [therein]." The judge acknowledged that "certain items were seized reasonably within the scope of the search warrant," but others were not. The State concedes that some items seized were beyond the terms of the warrant. This gives rise to the proper sanction to be imposed. The judge believed that the sanction was that *all* of the fruits of the search must be suppressed. He declared:

> "The search was conducted in a general manner without regard to the limits of the search warrant. . . . "

"[F]or that reason," he held, "the motion to suppress items seized under the search warrant issued for 6201 Greenbelt Road, Greenbelt, Prince George's County, Maryland, [the pharmacy,] must be granted."

C

The Court of Special Appeals disagreed. It posited, 92 Md. at 345, 608 A.2d 792, that

> the appropriate sanction for a scope violation in the course of a warranted search is, with the exception of the rare and outrageous case where the entire execution of the warrant can be deemed either a subterfuge or a farce . . .

"[a] particularized, rather than plenary, suppression," quoting Justice Souter of the Supreme Court of New Hampshire (now of the Supreme Court of the United States) in *State v. Valenzuela*, 130 N.H. 175, 197, 536 A.2d 1252, 1267 (1987), *cert. denied*, 485 U.S. 1008, 108 S.Ct. 1474, 99 L.Ed.2d 703 (1988). The Court of Special Appeals looked to a statement by Judge Kennedy (now Justice Kennedy of the Supreme Court of the United States) in *United States v. Rettig*, 589 F.2d 418 (9th Cir.1978) which, as quoted in *United States v. Heldt*, 668 F.2d 1238 (D.C.Cir.1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982), was that

> "in some cases a flagrant disregard for the limitations in a warrant might transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed."

668 F.2d at 1259. The Court of Special Appeals then quoted with approval the general rule as set out in *Heldt*, *id.*

> "Absent that sort of flagrant disregard, the appropriate rule seems to be that where officers seized some items outside the scope of a valid

> warrant, this by itself will not affect the admissibility of other contemporaneously seized items which do fall within the warrant."

92 Md.App. at 347, 608 A.2d 792. The intermediate appellate court opined that the constitutional violation in the circumstances here "was by no stretch of the imagination . . . fraudulent, corrupt, outrageous, or flagrant." *Id.* at 340, 608 A.2d 792.

On the finding that the conduct of the officers in the search and seizure at the pharmacy did not amount to a flagrant disregard for the limitations in the warrant, the Court of Special Appeals applied the sanction it found to be the general rule:

> We hold, therefore, that the order of the hearing judge directing the total exclusion of all items seized in the search of the appellee's pharmacy was in error and is hereby reversed. Necessarily, the case will have to be remanded for a determination of which seized items were clearly beyond the scope of the warrant's command or were not otherwise seizable, which items should be excluded from evidence and returned to the appellee, and which other seized items fell within the warrant's command or were otherwise properly seizable, which items should not be suppressed.

Id. at 356-357, 608 A.2d 792.

We find no opinion of this Court which directly addressed the matter of the sanction when there is a scope violation. The intermediate appellate court referred to two of its earlier opinions, *Spease and Ross v. State*, 21 Md.App. 269, 319 A.2d 560 (1974), *aff'd*, 275 Md. 88, 338

A.2d 284 (1975), and *Andresen v. State*, 24 Md.App. 128, 331 A.2d 78 (1975), *cert. denied*, 274 Md. 725, *aff'd*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). In our affirmance of *Spease*, however, we found it unnecessary under the circumstances to determine whether all the evidence (in that case conversations were seized) was required to be suppressed. 275 Md. at 103, 338 A.2d 284. In *Andresen* the issue was never before us, as we declined to review the case. The Supreme Court of the United States has not provided a definitive answer. In *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927) a central issue was the propriety of a seizure under a warrant. The Court discussed the particularity requirement of the Fourth Amendment, but the Court was able to legitimate the seizure of the disputed evidence even without a search warrant, deeming it to be incident to a lawful arrest. The Supreme Court's *Andresen*, 427 U.S. at 482 n. 11, 96 S.Ct. at 2749 n. 11, stated:

> The record discloses that the officials executing the warrants seized numerous papers that were not introduced into evidence. Although we are not informed of their content, we observe that to the extent such papers were not within the scope of the warrants or were otherwise improperly seized, the State was correct in returning them voluntarily and the trial judge was correct in suppressing others.

Other than that hint, the main thrust of the Court's Fourth Amendment discussion did not go to the question here; the issue was whether the commands of the warrant in question made it a general warrant. The Court held that they did not. *Id.* at 478-484, 96 S.Ct. at 2747-2750.

The Court of Special Appeals turned to cases decided by various United States Courts of Appeal on the appropriate sanction for a scope violation in the case of a warranted search. *See Klingenstein*, 92 Md.App. at 345-355, 608 A.2d 792. They all support the general rule accepted by the Court of Special Appeals. We have also surveyed the cases in other jurisdictions which addressed the matter of the suppression of evidence seized under a warranted search. We find accord with the view of the Court of Special Appeals. The federal courts have consistently held that the seizure of items outside the scope of the warrant will not ordinarily affect the admissibility of items properly seized. *See*, for example, in addition to the cases cited by the Court of Special Appeals, *United States v. Artieri*, 491 F.2d 440, 446 (2d Cir.), *cert. denied*, 419 U.S. 878, 95 S.Ct. 142, 42 L.Ed.2d 118 (1974); *United States v. Forsythe*, 560 F.2d 1127, 1134 (3rd Cir. 1977); *United States v. Beusch*, 596 F.2d 871, 876 (9th Cir.1979); *U.S. v. Premises Known as 1007 Morningside*, 625 F.Supp. 1343, 1350 (N.D.Iowa 1985); *Watts v. Kroczynski*, 636 F.Supp. 792, 801 (W.D.La. 1986); *Huebner v. U.S.*, 731 F.Supp. 1441, 1446 (D.Ariz.1990).

We have also sampled the opinions of state appellate courts. They are in complete harmony with the general rule. *See*, for example, *State v. Romero*, 660 P.2d 715, 717 (Utah 1983); *State v. Monsrud*, 337 N.W.2d 652, 661 (Minn. 1983); *Commonwealth v. Lett*, 393 Mass. 141, 470 N.E.2d 110, 113-114 (1984); *State v. Riedinger*, 374 N.W.2d 866, 872 (N.D.1985); *State v. Valenzuela*, 536 A.2d at 1267.

In short, it appears to be universally recognized that under the Fourth Amendment the exclusionary rule does not act to suppress evidence seized within the scope of a

warrant simply because evidence outside the scope of a warrant was unlawfully seized. In other words, the general rule is that only those items which were unconstitutionally seized are to be suppressed; those which were constitutionally seized may stand. We are in accord with this view and find it to be consistent with the import of our opinions. *See*, for example, *Brooks v. State*, 235 Md. 23, 29, 200 A.2d 177 (1964); *State v. Wilson*, 279 Md. 189, 195, 367 A.2d 1223 (1977); *Wiggins v. State*, 315 Md. 232, 252-253, 554 A.2d 356 (1989). Therefore, we affirm the judgment of the Court of Special Appeals with respect to the order of the Circuit Court for Prince George's County suppressing the fruits of the search of the pharmacy.

D

In its discussion of the sanction for a scope violation, the Court of Special Appeals noted an exception to the general rule. If there were a "flagrant disregard" of the terms of the warrant, *all* the items seized must be suppressed. Although the intermediate appellate court found that there was not such a flagrant disregard in the circumstances of the search of the pharmacy, it gave the impression that the flagrant disregard concept was appropriate under the Fourth Amendment. Klingenstein leaned heavily on the flagrant disregard exception in arguing that the suppression of all of the items seized at the pharmacy was proper. The Supreme Court of the United States, however, has not adopted the concept. That Court has made no more than passing reference to it. In *Waller v. Georgia*, 467 U.S. 39, 43-44, n. 3, 104 S.Ct. 2210, 2214, n. 3, 81 L.Ed.2d 31 (1984), the Court said:

> Petitioners' second Fourth Amendment challenge is that police so "flagrant[ly] disregard[ed]" the scope of the warrants in conducting the seizures at issue here that they turned the warrants into impermissible general warrants. Petitioners rely on lower court cases such as *United States v. Heldt*, 215 U.S. App.D.C. 206, 227, 668 F.2d 1238, 1259 (1981) (*per curiam*), cert. denied *sub nom. Hubbard v. United States*, 456 U.S. 926 [102 S.Ct. 1971, 72 L.Ed.2d 440] (1982), and *United States v. Rettig*, 589 F.2d 418, 423 (CA9 1978), for the proposition that in such circumstances the entire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed. Petitioners do not assert that the officers exceeded the scope of the warrant in the places searched. Rather, they say only that the police unlawfully seized and took away items unconnected to the prosecution. The Georgia Supreme Court found that all items that were unlawfully seized were suppressed. In these circumstances, there is certainly no requirement that lawfully seized evidence be suppressed as well.

Although courts in other jurisdictions have discussed the exception, our attention has been called to only two cases in which the flagrant disregard concept has been applied to suppress all of the fruits of a search, both those constitutionally seized as well as those beyond the scope of the warrant. *United States v. Medlin*, 842 F.2d 1194 (10th Cir.1988) and *State v. Johnson*, 605 So.2d 545

(Fla.App.1992).[1] We are not persuaded to overlay the exclusionary rule of the Fourth Amendment with the "flagrant disregard" concept. The Supreme Court has not seen fit to do so and neither do we.

III

A

The hearing judge was concerned with the probable cause requirement of the Fourth Amendment with respect to the warrant for the search of the home. He found that it fell short of constitutional standards. He observed that the application for the second warrant incorporated therein the application for the first warrant and that the application for the second warrant not only made several references to items seized under the first warrant but also attached the inventory report of items seized in the first search. This convinced the judge that

> the second search warrant and items seized pursuant to it must have relied in part on the fruits of the poisonous tree.

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[1] In *United States v. Rettig*, 589 F.2d 418 (9th Cir.1978) the court held that the failure of the federal agents to inform the state judge that a federal judge refused to issue a warrant the day before transformed the entire warrant exercise into a massive subterfuge, calling for suppression of all of the evidence. 589 F.2d at 421-423. *Rettig* does not appear to be within the "flagrant disregard" concept. The action of the police amounted to an outright fraud on the court. *See State v. Klingenstein*, 92 Md.App. 325, 346-347, 608 A.2d 792 (1992).

In sum, the judge held that the issuance of the warrant for the search and seizures at the home was unconstitutional because it was deficient with respect to probable cause. He had found that the seizure of some of the items during the search of the pharmacy did not meet constitutional standards and he had suppressed them. Inasmuch as those unconstitutionally seized items were at least to some extent relied upon to show probable cause for the issuance of the warrant for the home, the warrant for the home was so tainted as to render it unconstitutional. It followed, he believed, that the seizures at the home were unreasonable, there being no valid warrant to justify them. It was because this tainted information had been infused into the application for the second warrant that the judge granted the motion to suppress with respect to the search of the home.

B

The Court of Special Appeals found the question with respect to the search of the home to be what sanction is applicable when "some tainted information entered into the warrant application. . . . " 92 Md. App. at 329-330, 608 A.2d 792. The court's reading of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) and *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), as discussed at 357-361 of 92 Md.App., 608 A.2d 792, led the court to conclude that constitutionally tainted material may be factored out of the warrant application and the remaining untainted material may be assessed to see whether it alone establishes probable cause. "Notwithstanding the

presence of tainted information in a warrant application," the intermediate appellate court observed, "the adequacy of the remaining untainted information to establish probable cause is, *ipso facto*, an independent source for the issuance of the warrant." 92 Md. App. at 361, 608 A.2d 792. An "independent source" provides an exemption to the "poisonous tree" doctrine, holding that, "when the Fourth Amendment has been violated in obtaining evidence, such tainted evidence shall not only not be used directly but shall not be used at all." *Id.* at 360-361, 608 A.2d 792. The Court of Special Appeals concluded, "Applying the *Franks v. Delaware* principle to the search of [Klingenstein's] home yields a simple conclusion."

> The mention in the warrant application for the home that Schedule II drugs had been recovered in the search of the pharmacy was not an indispensable or pivotal component of probable cause. It was a *de minimis* triviality. Remaining, untainted information abundantly established probable cause for the search of the appellee's home. In all likelihood, if we factored out the very fact that the pharmacy had ever been searched, the probable cause for the search of the home would not be fatally eroded. *A fortiori*, factoring out the passing mention of those items seized that were a scope violation would not fatally erode that probable cause.

Id. at 362, 608 A.2d 792. The court held:

> There was no justification for the invalidation of the warrant to search the home and for the suppression of its fruits.

Id. The Court vacated the suppression order for the home and remanded the case for further proceedings consistent with its opinion. *Id.*

C

We agree with the Court of Special Appeals that under *Franks, Karo,* and *Wade* the tainted information in the warrant application does not necessarily render the warrant unconstitutional. But we think that when there is a motion to suppress the evidence seized under a warrant based on lack of probable cause for the issuance of the warrant the matter is initially for the hearing judge. The belief of the judge issuing the warrant that the application showed probable cause is not conclusive when questioned and is subject to review by the hearing judge. *See Birchead v. State,* 317 Md. 691, 701-702, 566 A.2d 488 (1989); *Potts v. State,* 300 Md. 567, 570-573, 479 A.2d 1335 (1984). It follows that the culling of tainted information and the determination of whether the remaining untainted information is adequate to show probable cause is also a matter for the hearing judge in the first instance. The further proceedings on remand to the circuit court should be to that end, not strictured by a culling by the appellate court and a holding by it that the remaining untainted information was adequate. If the hearing judge concludes, after factoring out the tainted information, that the information remaining established probable cause for the issuance of the warrant, he should, of course, uphold it and deny the motion to suppress insofar as it is founded on the unconstitutionality of the issuance of the warrant. The appellate court will then be

in a position to perform its function of making an independent constitutional appraisal of the propriety of the hearing court's rulings. *See McMillian v. State*, 325 Md. at 281, 600 A.2d 430; *Riddick v. State*, 319 Md. 180, 183, 571 A.2d 1239 (1990); *Harris v. State*, 303 Md. 685, 697, 496 A.2d 1074 (1985).

If the hearing judge, after culling out the tainted information, determines that the remaining showing of probable cause is sufficient, there remains, in the circumstances here, a question arising under the particularity clause of the Fourth Amendment. This question was not reached by the hearing judge nor was it addressed by the Court of Special Appeals. If the hearing judge determines that the issuance of the home warrant met the constitutional guarantee of probable cause, he shall then determine under the particularity clause which items seized were within the terms of the warrant and which items were beyond the scope of the warrant. He shall deny the motion to suppress as to those items which he finds were constitutionally seized and grant the motion only as to those items which were seized beyond the terms of the warrant.

JUDGMENTS OF THE COURT OF SPECIAL APPEALS AFFIRMED IN PART AND REVERSED IN PART;

CASE REMANDED TO THAT COURT WITH DIRECTION TO REMAND THE CASE TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY WITH DIRECTION TO VACATE ITS JUDGMENTS AND TO CONDUCT FURTHER PROCEEDINGS PURSUANT TO THIS OPINION;

COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY PETITIONER.

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92 Md.App. 325

STATE of Maryland

v.

Keith Gordon KLINGENSTEIN.

No. 170 Sept. Term, 1992.

Court of Special Appeals of Maryland.

July 1, 1992.

Mary Ellen Barbera, Asst. Atty. Gen., Baltimore, argued (J. Joseph Curran, Jr., Atty. Gen., Baltimore, and Alexander Williams, Jr., State's Atty. for Prince George's County, Upper Marlboro, on the brief), for appellant.

Fred R. Joseph and Leonard R. Stamm, Greenbelt, argued (Joseph, Greenwald & Laake, P.A. and Goldstein & Stamm, P.A. on the brief), for appellee.

Argued before MOYLAN, BISHOP and BLOOM, JJ.

MOYLAN, Judge.

The appellee, Keith Gordon Klingenstein, is a registered pharmacist in Prince George's County. On March 22, 1991, the Grand Jury filed a 54-count indictment against him, charging the maintaining of a common nuisance and multiple instances of distributing a controlled dangerous substance; possessing a controlled dangerous substance with intent to distribute; failing to store drugs, medicines, and devices in a proper and safe manner; and aggregated theft of over $300.

The appellee moved to suppress all of the fruits of searches of 1) his pharmacy at 6201 Greenbelt Road executed pursuant to a warrant on October 12, 1990 and 2)

his home at 9115 49th Place in College Park also pursuant to a warrant and executed the same day. Following a two-day suppression hearing, a Prince George's County judge granted the appellee's motion to suppress all evidence seized from both pharmacy and home. By authority of Md.Cts. & Jud.Proc. Code Ann. § 12-302(c) (1974, 1989 Repl. vol.), the State has appealed that suppression order. We hereby reverse it.

Two separate searches pursuant to two separate search warrants are involved. The warrant to search the pharmacy was issued by Judge David Gray Ross shortly before noon on October 12. The suppression hearing judge found, quite properly in our judgment, that there was no flaw in its issuance. The application established ample probable cause and the hearing judge so found. The command clause, moreover, was adequately particularized to limit effectively the scope of what would be done under the warrant and the hearing judge so found. The hearing judge ruled, however, that the *execution* of the warrant was flawed because the executing officers went beyond the scope of the warrant's authority.

The second warrant, for the search of the appellee's home, was issued on the late afternoon of the same day by Judge John F. Kelly, Sr. The hearing judge found fault neither with the execution of that warrant nor with its issuance, if the probable cause equation were to be evaluated strictly within the four corners of the warrant application. The hearing judge ruled, however, that fruits of the flawed search of the pharmacy fatally tainted the probable cause for the warrant to search the home. That second warrant to search the home, therefore, was invalidated as "the fruit of the poisonous tree."

The Only Question is that of Sanctions

Before us are two doctrinally distinct search and seizure issues, each involving the selection of the appropriate sanction for a hypothesized Fourth Amendment violation. With respect to the search of the pharmacy, assuming that some items were seized within the authority of the warrant and other items seized beyond that authority, what is the appropriate sanction? With respect to the search of the home, assuming that some tainted information entered into the warrant application, what is the appropriate sanction?

The Probable Cause Background

Although the probable cause to support the warrant to search the pharmacy was undisputed, a brief recital of its highlights will set the stage for a better understanding of the searches that followed. On October 5, 1990, Trooper David Hammel, of the Drug Diversion Unit of the Maryland State Police, was contacted by a Washington County pharmacist and advised that two individuals had tried, unsuccessfully, to pass forged prescriptions for controlled drugs. The two suspects were shortly thereafter arrested at a Peoples Drug Store in Frederick as they persisted in their efforts to pass forged prescriptions. The suspects were Harold Brian Firor and John Andrew Hulse. Under interrogation by the State Police, both gave detailed statements about having obtained controlled substances from the appellee at the appellee's pharmacy in the College Park area. Both suspects informed the police that they

had been obtaining drugs from the appellee regularly since 1987.

Part of the story that unfolded was that two Schedule III drugs: 1) Doriden, the trade name for glutethimide; and 2) Tylenol 4, containing a designated percentage of codeine, when used in combination with each other, produce an effect similar to that of heroin, an effect which can last for approximately twelve hours. The two drugs, in combination, are known on the street as a "max load." It was these drugs that Firor and Hulse had been attempting to obtain in Hagerstown and Frederick. It was these drugs that the two of them had been obtaining regularly from the appellee since 1987. The typical "max load" consisted of four Tylenol with codeine tablets combined with two Doriden (glutethimide) tablets. The prescriptions, therefore, were always for exactly twice as much Tylenol 4 as Doriden. Firor also indicated that he could regularly push a "max load" on the street for $35.

Firor elaborated on the *modus operandi* he used when obtaining drugs from the appellee's pharmacy. He would forge his prescriptions by making photocopies and taking them to the pharmacy. The password regularly employed to trigger the exchange consisted of asking the appellee, "Will $150 be enough?" The appellee would invariably give, by way of countersign, an exact price. Firor pointed out that the appellee would always wait until nobody else was in the drugstore before dispensing the drugs to Firor. Hulse verified in all details the information given by Firor.

In an effort to verify the information given by the suspects, Trooper Hammel, on October 9, began a series

of attempted "controlled buys." On October 9, the first effort met with unexpected difficulty. In an undercover capacity, Trooper Margaret Shank attempted to have the appellee fill forged prescriptions for 1) Doriden, 2) Tylenol 4, and 3) penicillin. The prescriptions were in the name of Kim Firor and were photocopies of forms of a Dr. Lugener of Baltimore. There was, however, a Washington, D.C. address on the form that had been obtained from another prescription form and glued onto the Lugener form prior to photocopying. The appellee declined to fill the prescriptions for the Doriden and for the Tylenol 4, ostensibly because he was prohibited from filling Schedule III prescriptions that had been written in the District of Columbia. He did offer to fill the prescription for penicillin, however, but Trooper Shank declined to have that prescription alone filled. She indicated she would return with another prescription. The warrant application also suggested, however, an alternative hypothesis for the failure of that first attempt. Trooper Shank had failed to give the designated password; to wit, she did not tell the appellee that she had "one hundred and fifty dollars" and then ask him if that "would be enough?"

The investigative fortunes improved the following day, October 10, when Trooper Hammel met with a confidential informant, who represented incidentally yet a third source of information about the appellee's pharmacy. The confidential informant stated that he (or she) had been in the pharmacy on several occasions and had obtained the two controlled dangerous substances under discussion in the proportions that have been discussed. The informant indicated that at one time the appellee had charged as much as $250 to fill such a set of prescriptions.

The informant further stated that on every visit to the pharmacy, he had dealt exclusively with the appellee.

Trooper Hammel dispatched the confidential informant to the pharmacy with forged prescriptions for 1) Doriden, 2) Tylenol 4, and 3) penicillin, but this time in the name of another doctor with a Maryland address. Trooper Hammel, in plain clothes, followed into the pharmacy to monitor the proceedings. The appellee appeared unnerved at his presence. He stopped what he was doing, came over to the trooper, and asked if he could help him. Trooper Hammel purchased several meaningless items and left. Once the trooper was gone, the appellee filled the three prescriptions. The likelihood that the prescriptions were, indeed, forgeries was enhanced by the fact that they were written not on original doctors' forms but on photocopies of such forms. The relative quantities of the two drugs, moreover, were in precisely the proportion used on the street to produce a "max load." The thirty Doriden tablets and sixty Tylenol with codeine tablets that had been purchased were enough to produce fifteen "max loads," with the estimated street value of $525. Whatever purpose was served by the thirty penicillin tablets has not yet been revealed. The appellee charged the confidential informant $135 for the three prescriptions. A check with other pharmacies in the area yielded a more normal expected retail cost of $27. The appellee placed the orders in a prescription bag and handed it to the confidential informant, who turned it over to Trooper Hammel immediately after leaving the pharmacy. The prescription bag had no receipt attached to it and the labels on the prescription bottles were improperly filled out.

On the following day, October 11, Trooper Margaret Shank was successful in having the appellee fill forged prescriptions for precisely thirty Doriden tablets and sixty Tylenol 4 tablets. On that occasion, Trooper Shank was careful to use the password. She informed the appellee that she "had $150 and wondered if that would be enough." He responded by pulling out a calculator and answering, "$127." On that occasion, the name used on the prescription forms was "Maria Firor," whereas on the preceding two days, the name "Kim Firor" had been used. Both Maria Firor and Kim Firor, however, were listed as living at the same address. Again on that occasion, the appellee did not provide the purchaser with a receipt. The customer, thereby, was furnished no tell-tale evidence of the inflated price charged to fill the order. On that October 11 controlled buy, Trooper Shank noticed that the prescription form for penicillin had not been signed. She, therefore, did not present that form to the appellee to be filled. For the other two prescriptions, she was charged $127.95 for drugs that, again according to a check with other pharmacies in the area, should have retailed for approximately $27.

The probable cause application also contained another interesting tidbit. The appellee's pharmacy had recently reported a breaking and entering to the Federal Drug Enforcement Administration. That report stated that various controlled dangerous substances had been stolen. There was, therefore, clear evidentiary support for a hypothesis that the appellee was attempting to create in advance an explanation, should one ever be needed, for either 1) the traceable appearance of certain controlled

substances on the street or 2) the appearance of a suspiciously heavy commerce in certain drugs disproportionate to the volume of sales of other drugs.

In terms of probable cause, an ongoing pattern of likely criminal activity clearly emerged from 1) the information provided by Firor, 2) the information provided by Hulse, 3) the information provided by the unnamed confidential informant, and 4) the direct observations made in the course of the attempted and consummated controlled buys of October 9, October 10, and October 11. Forged prescriptions were regularly submitted to the appellee for thirty Doriden tablets and sixty Tylenol 4 (with codeine) tablets, with or without an additional order of thirty penicillin tablets. The prescriptions were always presented directly to the appellee and filled by him only when his pharmacy was otherwise empty of customers. The password "Is $150 enough?" was regularly given and the countersign of calculating and quoting a precise price was regularly returned. Drugs of a retail value of approximately $30 were regularly sold by the appellee for approximately $135, a healthy markup for the criminal risk assumed. The drugs were then available for marketing, as "max loads," for a street value of $535, an additional $400 of profit for the street pusher. This pattern of criminality, or other similar patterns, had apparently been going on since 1987, a period of at least two years as measured from October, 1989.

The stage was thus set for the search of the pharmacy on October 12. As he moved toward the conclusion of the warrant application, Trooper Hammel averred:

> "I am satisfied that there is probable cause to believe that there is now being concealed certain property, namely 'Glutethimide,' 'Codeine,' and 'Doriden' on the person/s premises above described . . . "

The key directives of the Command Clause of the warrant itself were:

> "C. Open and search any safe, box, bag, compartment, or thing in nature thereof, found in or upon said premises or person/s;
>
> D. Seize all evidence, paraphernalia, controlled dangerous substance, and monies used in or incidental to the conduct or operation of controlled dangerous substance violations, found in or upon said premises, person/s. . . . "

The hearing judge ruled that there was ample probable cause to support the warrant. He further ruled that the Command Clause was adequately particularized and limited in its scope. He interpreted the command to seize "all evidence, paraphernalia, controlled dangerous substance, and monies used in or incident to" the probable violations to relate only to items in those categories that were somehow connected to the unlawful disbursing of the 1) Doriden, 2) Tylenol 4, and 3) penicillin referred to in the warrant application. In the last analysis, no fault whatsoever was found with the issuance *per se* of the search warrant. We think that ruling was eminently correct.

The Execution of the Warrant

Trooper Hammel led the searching party. He was assisted by three other troopers. Because of the need to

distinguish one drug from another and to determine which records and prescriptions related to particular drugs, the searching party was accompanied by Jack Freedman, a pharmacist and auditor from the Maryland Department of Health and Mental Hygiene. With minute determinations that had to be made with respect to the drugs themselves, vial by vial and box by box, and with similarly detailed determinations that had to be made with respect to prescriptions, receipts, drug order forms and other records, the completion of the search took over four hours.

In the course of the search there was recovered a container of Doriden, five containers of Tylenol with codeine, and a container of penicillin. Numerous order forms, receipts, daily accounting forms, prescriptions, and other business records and inventories were recovered. Of unusual significance was a brown paper bag containing what appeared to be trash. An inspection of the bag, however, revealed $9,408 in U.S. currency. The bag was tucked away from the normal business records and common working area of the pharmacy. The currency inside the bag was wrapped in eleven bundles and rubber-banded together. One of the state troopers, in his subsequent application for a warrant to search the appellee's home, averred that from his experience and training, he knew that "this method of wrapping currency is indicative of individuals who are conducting illegal acts, mainly controlled dangerous substance violations. The . . . method is used for easy counting and exchange of currency between the distributor and the purchaser."

Because there has yet been no trial, it is difficult from our vantage point to predict precisely the value of the

evidence recovered in the search of the pharmacy or to assess the precise nexus between it and the command clause of the warrant. From the characterization of some of that evidence in the subsequent application for the warrant to search the appellee's home, however, it is possible to extrapolate some evidentiary significance and some of the apparent nexus. From what seems to be a reference to the Doriden and the Tylenol 4, it may be inferred both that they were found 1) in excessively large quantities and 2) in unusual locations. Such observations would almost certainly be pertinent as proof of guilt:

> "Excessively large amounts of commonly abused Controlled Dangerous Substances which are sold and used on the 'street' were located within the pharmacy in places not normally associated with the common practices of a legitimate pharmacy."

The search for and seizure of various documents, moreover, apparently bore fruit in terms of corroborating the information from the various sources as to the regular *modus operandi* earlier recounted in the application for the warrant to search the pharmacy:

> "That during the execution of the aforementioned warrant numerous, obviously forged prescriptions, dating from early 1987 were found at the pharmacy. These documents further corroborate the statements given by the previously mentioned informants."

Whatever problem inhered in the execution of the search warrant occurred when Jack Freedman, the pharmacist and auditor with the Drug Control Division of the

State Department of Health and Mental Hygiene, determined that the appellee's license to operate a pharmacy was going to be suspended. Accordingly, he directed the officers conducting the search to seize all Schedule II drugs. They did so. This aspect of the total seizure involved approximately 67 containers of pills. This was the aspect of the total seizure that the hearing judge found to have been beyond the scope of the command clause of the warrant.

The State argues that the command clause included the direction to seize all "controlled dangerous substances," which, by definition, included all Schedule II drugs. As the hearing judge interpreted the command clause, however, he read such general commands as those to seize "all evidence, paraphernalia, controlled dangerous substances, and monies" to be limited to those items in those categories that had a specific connection with the use of forged prescriptions to obtain Doriden, Tylenol 4, and penicillin, thus reading the command clause in conjunction with probable criminality spelled out in the warrant application. That was not an unreasonable reading of the command clause. Under such a reading, the seizure of the Schedule II drugs was not something particularly commanded by the warrant.

When read in conjunction, however, with the later allegation that "controlled dangerous substances of Schedule II were secreted in unlabeled prescription vials and found in unusual locations throughout the pharmacy which would be inconsistent with normal business practices," it is conceivable that the observations made by Jack Freedman and the subsequent seizures requested by him might have fallen within the legitimate coverage of

the Plain View Doctrine. While properly executing the warrant to search for evidence of certain violations, observed evidence of other violations spotted in plain view would authorize the warrantless seizure of such evidence notwithstanding the fact that the other violations were not the subject matter of the search warrant itself. *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). In this case, however, such an alternative theory was never urged by the State at the suppression hearing and a proper evidentiary predicate for it was obviously not offered. Under the circumstances, we will assume, *arguendo*, that the seizure of the Schedule II drugs was, indeed, a scope violation.

In concluding that the seizure of the Schedule II drugs was a scope violation, the fact that the seizing officers acted on the orders of Jack Freedman is a nonfactor. If the officers had seized something clearly beyond the scope of the command clause as reasonably interpreted, their *bona fide* belief that they were obeying the judicial commandment would not absolve them of constitutional sin, even had Jack Freedman never been along on the raid. Conversely, if they had seized something unequivocally directed by the warrant, their gratuitous confession that they had done so not in the service of the true warrant but in the service of a false god, would not invalidate their otherwise *objectively* reasonable behavior. *Graham v. Connor*, 490 U.S. 396, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443, 456 (1989), *Maryland v. Macon*, 472 U.S. 463, 470-471, 105 S.Ct. 2778, 2782-83, 86 L.Ed.2d 370, 378 (1985).

The passing observation of the hearing judge, moreover, that "more than four hours was consumed in conducting this search" is also without significance. There is no remote suggestion that the officers had already found everything they were properly looking for under the warrant early in the course of the search and then deliberately dallied on a needlessly prolonged "fishing expedition." This was not a case where they were looking for some unique article of stolen property or some distinctive instrumentality of crime, the finding of which would trumpet the triumphal consummation of the search and call down an immediate final curtain. They were not looking, *inter alia*, for *some* Doriden and *some* Tylenol 4. They were looking for *all* of it. How else could they assess whether such drugs were present in inordinate quantity? The search for *all* Doriden, Tylenol 4, and penicillin required minute scrutiny – container by container – of all the chemicals in the pharmacy. The fact that some of the described drugs were found in strange and sundry corners, moreover, underscores their prudence in probing meticulously each nook and cranny. The necessity to pore over thousands of scraps of paper in quest of possibly forged prescriptions and of receipts, order forms, and records pertaining to the Doriden, the Tylenol 4, and the penicillin made a painstaking and time-consuming examination inevitable.

The officers, as a matter of course, were required to look for any prescriptions made out to a customer bearing the name of "Firor." Quite reasonably, they would have been looking as well for any other prescriptions issued by doctors whose names had been listed as having issued any of the prescriptions to anyone named "Firor."

The officers would also reasonably have been looking for any prescriptions at all made out on Xeroxed rather than on original prescription forms, as possibly forged prescriptions. They would, within the reasonable contemplation of the warrant, also have been looking for any prescriptions combining thirty Doriden tablets with sixty Tylenol 4 tablets, or, indeed, any prescriptions for those two drugs in other quantities but in the same proportion.

Realistically, the only practical way to have shortened the search would have been to have seized all the drugs and then analyzed them in a more leisurely fashion at the police station and to have seized all of the documents and then peruse them in a more leisurely fashion at the police station. Axiomatically, the briefer the search, the broader the necessary seizure; the longer the search, the narrower the possible seizure. As was observed in *United States v. Whitten*, 706 F.2d 1000, 1010 (9th Cir.1983):

> "Although it may be intrusive for police officers to remain in a home and make a careful examination of items to determine whether they fall within the description of the warrant, it is equally intrusive for them to carry off papers and personal effects indiscriminately for later review."

The search in this case was essentially of the same duration as that search of a similarly complicated nature sanctioned by us and by the Supreme Court in *Andresen v. State*, 24 Md.App. 128, 331 A.2d 78 (1975), *aff'd*, *Andresen v. Maryland*, 427 U.S. 463, 467, 96 S.Ct. 2737, 2742, 49 L.Ed.2d 627, 634 (1976).

In affirming the hearing judge's ruling that the seizure of the Schedule II drugs was beyond the command

of the warrant, the duration of the search is simply a nonfactor in our analysis. Given the hearing judge's reasonable interpretation of the command clause as read in conjunction with the warrant application, the seizure of the Schedule II drugs would have been a scope violation whether it occurred in the first two minutes of a ten-minute search or in the last two minutes of a four-hour search. If it was beyond the scope of the warrant's command, it was so whenever it happened, early or late.

What we are faced with, then, is a scope violation – but not one that in any way shocks the conscience. The command clause of the warrant had, indeed, mentioned the seizure of "all . . . controlled, dangerous substances." Schedule II drugs, by definition, are "controlled dangerous substances." Unlike the hearing judge, the executing officers failed to read the warrant application and the warrant in conjunction with each other, thereby limiting the seizable "controlled dangerous substances" to the two or three described in the warrant application. That, in the last analysis, was a Fourth Amendment violation on their part. It was by no stretch of the imagination, however, fraudulent, corrupt, outrageous, or flagrant.

The Sanction for the Scope Violation

What, then, should the sanction for such more venial violation be? The Warrant Clause of the Fourth Amendment, of course, sets forth the necessary formalities of a valid warrant:

> "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched, and*

> *the persons or things to be seized.*" (emphasis supplied).

The requirement of a particular description of the "things to be seized" is a mechanism whereby the Constitution ensures that even a search proper in its initiation not be allowed to degenerate into a general rummaging about or fishing expedition. *Smith v. State*, 33 Md.App. 407, 409-410, 365 A.2d 53 (1976). This aspect of the particularity requirement was discussed in *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927):

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The *Marron* opinion itself was the first occasion the Supreme Court had to discuss the particularity requirement and to consider an appropriate sanction for its violation. In terms of the search warrant being executed in that case, there was a clear scope violation. Prohibition agents had obtained a warrant for an establishment containing six or seven rooms at 1249 Polk Street in San Francisco. The warrant particularly commanded them to search for and seize "intoxicating liquors and articles for their manufacture." In a closet in one of the rooms, the agents noticed and seized a ledger, which was clearly neither intoxicating liquor *per se* nor an article or ingredient used in the manufacture of such liquor. An examination of the ledger, however, revealed inventories of

liquors, receipts, expenses, and other business entries, including gifts to police officers. The ledger was, to say the least, an unexpected bonus and highly relevant evidence.

The central issue was the propriety of its seizure. The Supreme Court was unequivocal that the ledger, notwithstanding its evidentiary value, had not, even in general terms, been particularly described in the warrant and that it could not, therefore, be seized under the warrant. "And it is clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant." 275 U.S. at 198, 48 S.Ct. at 76. There was no suggestion, however, that the admissibility of intoxicating liquors properly commanded by the warrant, was in any way jeopardized by the scope violation with respect to the ledger. If the only legitimate theory for any Fourth Amendment activity had been the warrant itself, the case would have called for the admission of the intoxicating liquors but the exclusion of the ledger. Fortuitously, however, the Supreme Court was able to legitimate even the *warrantless* seizure to the ledger under an alternative theory of search incident to lawful arrest.

The utilization of the exclusionary sanction as a carefully controlled scalpel rather than as an indiscriminate blunderbuss has consistently been sanctioned by this Court. In *Spease and Ross v. State*, 21 Md.App. 269, 319 A.2d 560 (1974), *aff'd* 275 Md. 88, 338 A.2d 284 (1975), we were dealing with the closely allied problem of an appropriate sanction for the hypothesized failure to minimize the seizure of conversations under the wiretapping and electronic eavesdropping laws. Central to that discussion was the analogy to particularity and minimization

requirements under the Fourth Amendment proper. "Whether dealing with conversations or with tangible items, the issue is one of particularity – that language of the Fourth Amendment stating that the only valid warrants are those 'particularly describing . . . the things to be seized.' " 21 Md.App. at 282, 319 A.2d 560. After having made the analogy, we went on to observe:

> "The great weight of authority and, in our judgment, the sounder reasoning maintains that the failure to minimize requires *only the suppression of those conversations which should not have been seized and not the suppression of those conversations which were appropriately seized.*" (emphasis supplied).

Id. In *Spease and Ross*, 21 Md.App. at 283, 319 A.2d 560, we quoted with approval *United States v. Lagorga*, 336 F.Supp. 190, 197 (W.D.Pa.1971) *aff'd*, 530 F.2d 965 (3d Cir.1976):

> "It seems clear under the general law of search and seizure that if some of the items obtained satisfy the requirements of the law, the mere fact that other objects beyond the permissible ambit of the search must be suppressed, does not require that all of the evidence must be necessarily so treated."

The issue of fashioning an appropriate sanction for a possible scope violation was before us again in *Andresen v. State*, 24 Md.App. 128, 180-181, 331 A.2d 78 (1975), *aff'd*, *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). In *Andresen*, we were dealing with two searches of a lawyer's legal office and his separate real estate office that consumed between four and five hours. Numerous documents were seized. The defendant

there argued that the seizures had been so sweeping as to invalidate the entire execution of the search warrants. In concluding that a more narrowly fashioned sanction could properly distinguish between those items constitutionally seized under a warrant and those other items the seizure of which constituted a scope violation, we stated unequivocally at 24 Md.App. at 180, 331 A.2d 78:

> "The appellant frames a final Fourth Amendment argument not in terms of those things 1) which were not suppressed and 2) which were admitted into evidence, but in terms of that much larger quantity of items which were seized initially but which did not pass through all of the screens. (A number of items which were not suppressed were not offered as evidence by the State because they related to other indictments against the appellant which had not yet come on for trial.) *The short answer to the contention is that even if other items had been unconstitutionally seized, that frailty would not mandate the suppression of the items which were constitutionally seized.*" (emphasis supplied).

In affirming this Court, the Supreme Court adverted to this clear distinction between admitting those seized items that had been particularly described and suppressing other seized items which had not been particularly described:

> "The record discloses that the officials executing the warrants seized numerous papers that were not introduced into evidence. Although we are not informed of their content, we observe that *to the extent such papers were not within the scope of the warrants or were otherwise*

> *improperly seized*, the State was correct in returning them voluntarily and *the trial judge was correct in suppressing* others." (emphasis supplied).

427 U.S. at 481 n. 11, 96 S.Ct. at 2749 n. 11. The Supreme Court, however, approved, as had we, the admissibility of those other papers that had been adequately particularized.

We reverted to this question of whether the sanction for a scope violation should be a scalpel or a blunderbuss for yet a third time in *Shoemaker v. State*, 52 Md.App. 463, 485-486, 451 A.2d 127 (1982). In the course of executing a warrant, the searching party did, to be sure, seize a large number of items that had not been particularly described in the warrant. The claim was there made, as it had been in *Andresen*, that the overly broad sweep of the seizures called for the suppression of all seized items, even those that had been particularly described. In rejecting the blunderbuss approach for yet a third time, we held at 52 Md.App. at 485-486, 451 A.2d 127:

> "The appellants claim that in addition to seizing the evidence of crime properly and particularly described in the warrant, the searching party also seized a number of other, innocuous objects such as receipts for repairs to various structures, warranties for household appliances, oil company credit cards, a prescription for eyeglasses, a Social Security card, a Blue Cross/Blue Shield card, and an engraved picture of a racehorse. They urge, with no direct authority to support them, that this calls for the suppression of even the properly seized evidence. Our answer once again lies in *Andresen v. State*, 24 Md.App. 128, 180, 331 A.2d 78 [(1975)], *cert. denied*, 274 Md. 725, *aff'd*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d

627 (1976), which dealt with a remarkably similar set of facts and an almost identical claim:

> ' . . . even if other items had been unconstitutionally seized, that frailty would not mandate the suppression of the items which were constitutionally seized. If the apples remaining in the barrel when it ultimately comes to rest upon the trial table are constitutionally healthy, it matters not how many constitutionally rotten ones were discarded along the way.'
>
> See also *Spease and Ross v. State*, 21 Md.App. 269, 282-283, 319 A.2d 560, and cases cited therein."

See also Brooks v. United States, 416 F.2d 1044, 1049-1050 (5th Cir.1969); *United States v. Dzialak*, 441 F.2d 212, 216-217 (2d Cir.1971).

The law from the various United States Courts of Appeal on the appropriate sanction for a scope violation in the course of a warranted search is, with the exception of the rare and outrageous case where the entire execution of the warrant can be deemed either a subterfuge or a farce, in line with this more selective use of the exclusionary sanction – with what Justice Souter of the Supreme Court of New Hampshire (now of the Supreme Court of the United States) called, in *State v. Valenzuela*, 130 N.H. 175, 536 A.2d 1252, 1267 (1987), "particularized, rather than plenary, suppression."

The appellant seeks solace in *United States v. Rettig*, 589 F.2d 418 (9th Cir.1978), a case in which the 9th Circuit, speaking through Judge Kennedy (now Justice Kennedy), ordered total suppression. That case dealt with an

extreme exception to the general rule and is not remotely apposite to the situation before us. That was a case where the entire warranted search in question was a subterfuge from its very inception. Agents of the Federal Drug Enforcement Agency in Los Angeles had been investigating Rettig for some time for importing cocaine into the United States from Peru. On April 2, 1975, they attempted to obtain from a federal magistrate both a warrant for his arrest and a warrant to search his Morro Bay residence. The federal magistrate issued the arrest warrant but declined to issue the search warrant, finding that the probable cause was stale.

The federal agents arrested Rettig on the following day, April 3, with the assist of a ruse. One of the agents made an anonymous call to Rettig "warning" him that federal officers were on the way with both an arrest warrant *and* a search warrant. When the arresting officers received no immediate response to their rap at the door, they forced their way into the house and went to the second floor, where they found Rettig attempting to flush marijuana down the toilet. He was taken into custody. While some agents remained on the premises, another made a second attempt to obtain a search warrant based upon the flushing incident at the time of arrest.

On that second occasion, however, the agent went to a state judge and applied for a warrant to search for evidence of *marijuana* possession. The state court judge was not informed of the unsuccessful attempt the day before to obtain a federal warrant to search for evidence of cocaine possession and importation. Both the warrant application and the warrant to search for evidence of marijuana possession, however, included such seizable

items as cancelled mail, keys, rent receipts, utility bills, deeds, leases, and photographs, which unquestionably would have evidentiary value on the cocaine charges for which Rettig was subsequently prosecuted following that second search.

In ordering total suppression, the thrust of Judge Kennedy's opinion was that the failure of the agents to advise the state judge on April 3 of the unsuccessful attempt to obtain a federal warrant the day before transformed the entire warrant exercise of April 3 into a massive subterfuge. He pointed out, at 589 F.2d at 421:

> We think that in the hands of these agents the warrant issued on April 3 was used as an instrument for conducting the search for which permission had been denied on the previous day, a search that pertained to evidence of the cocaine charge, not to the possession of marijuana. In contrast to the affidavit filed with the state judge in support of the April 3 search warrant, the affidavit filed the day before with the federal magistrate described in detail, in four pages of single spaced text, the elaborate scheme to smuggle cocaine from Peru, including preliminary flights from California to Lima, Peru by way of New York. The affidavit revealed plans to smuggle cocaine by using hollowed out chess boards, film canisters, false bottom suitcases, and a plan to dissolve cocaine in wine bottles and recover it once it had been imported. The affidavit further recited that during the conspiracy, and at the time of the affidavit, Rettig occupied the Morro Bay residence. The search that was conducted, and the items seized, were more pertinent to these matters than to the marijuana charge, and *we conclude*

> *that the search was for purposes and objects not disclosed to the magistrate.*" (emphasis supplied).

An interesting contrast is provided by *United States v. Heldt*, 668 F.2d 1238 (D.C.Cir.1981). *Heldt* recognized the *Rettig* exception that "in some cases a flagrant disregard for the limitations in a warrant might transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed." 668 F.2d at 1259. It then went on to state the general rule:

> "Absent that sort of flagrant disregard, the appropriate rule seems to be that where officers seize some items outside the scope of a valid warrant, this by itself will not affect the admissibility of other contemporaneously seized items which do fall within the warrant."

Id.

Despite the extraordinary breadth of the search conducted in the *Heldt* case itself, the Court of Appeals for the District of Columbia held nonetheless that there was no "such flagrant disregard for the terms of the warrant which might make the drastic remedy of total suppression necessary." *Id.* The search was purusant to three warrants for premises owned and operated by the Church of Scientology, one in Washington, D.C. and the other in California. Over 200 FBI Agents and other government personnel participated in the searches which lasted over twenty hours. At one of the California sites alone, thirty rooms were searched as were hundreds of file cabinets, boxes, desks, and wall cabinets. Between 23,000 and 47,000 separate documents were seized. Of these, a bare 201 documents were singled out as pertinent evidence for

use at the trial. The appellants sought to have all documents, including those 201, suppressed on the grounds that the general nature of the search cried out for total suppression. Despite the breadth of the search, the Court held that there was no flagrant disregard of the terms of the warrant so as to mandate total suppression.

In supplying guidelines for broad-scale document searches, *Heldt* strongly recommended that searching agents receive adequate preparation in knowing precisely what documents they are looking for. In the search before it, however, some fifty additional agents had arrived in mid-search at one of the complexes who had been "given neither a meaningful opportunity to read the warrant and affidavit nor any sort of comprehensive briefing of their terms, before beginning their mission." 668 F.2d at 1261. Notwithstanding that lack of preparation, the Court held:

> "[O]n the whole, we conclude that the inadequate initial preparation of some agents, though disturbing, did not so taint this search as to convert it into a general rummage for evidence, and we therefore decline to order complete suppression on this basis."

668 F.2d at 1262.

In *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir.1982), a searching team of between ten and twelve agents began a search on one afternoon that continued through the next day. The agents seized between 50,000 and 100,000 individual documents. The Court held that although scope violations occurred and many documents had been seized that were not particularly described in the warrant, total suppression was not called for:

> "Appellant further argues, however, that a large proportion of the documents seized but not introduced in the government's case in chief were outside the scope of the warrant, suggesting that the search was so overbroad that all the fruits of the search should have been suppressed. Total suppression may be appropriate where the executing officer's conduct exceeds any reasonable interpretation of the warrant's provisions. Courts have consistently held, however, that absent a 'flagrant disregard' of the terms of the warrant, *the seizure of items outside the scope of a warrant will not affect admissibility of items properly seized.*" (citation omitted) (emphasis supplied).

683 F.2d at 1354.

In *United States v. Tamura*, 694 F.2d 591 (9th Cir.1982), only selected exclusion rather than total exclusion was called for notwithstanding excessive scope violations in the course of executing a warrant. The searching team of a business office consisted of thirteen FBI Agents. The agents "concluded that it would take a long time to find all the records they were looking for unless [the suspect company's] employees helped them." 694 F.2d at 595. The agents threatened the employees that if they did not cooperate, the agents would seize all of the records in question. When the employees decline to cooperate, the agents seized "11 cardboard boxes of computer printouts, which were bound in 2000-page volumes; 34 file drawers of vouchers, also bound in 2000-page volumes; and 17 drawers of cancelled checks, which were bundled into files. The agents hauled all these records to another location, where they sifted through them and extracted the relevant documents." *Id.* The Court condemned the

excesses. It disapproved of the indiscriminate seizure of all records:

> "[T]he wholesale *seizure* for later detailed examination of records not described in a warrant is significantly more intrusive, and has been characterized as 'the kind of investigatory dragnet that the fourth amendment was designed to prevent.' *We cannot sanction the procedure followed by the Government in this case.*" (citation omitted) (footnote omitted) (emphasis in original) (emphasis supplied).

It further disapproved of the government's failure to return records promptly that had been improperly seized:

> "Moreover, it was highly improper for the Government to retain the master volumes as a means of coercing [the suspect company's] employees to stipulate to the authenticity of the relevant documents. *The Government's unnecessary delay in returning the master volumes appears to be an unreasonable and therefore unconstitutional manner of executing the warrant.*" (emphasis supplied).

694 F.2d at 597. Notwithstanding those excesses, the documents that had been properly seized were held to be admissible at trial and total suppression was deemed far too draconic a remedy:

> "Regardless of the illegality of the Government's seizure and retention of documents not covered by the warrant, however, reversal is not compelled in this case. All of the documents introduced at trial were seized and retained lawfully because described in and therefore taken pursuant to the valid search warrant. *Generally, the exclusionary rule does not require the*

> *suppression of evidence within the scope of a warrant simply because other items outside the scope of the warrant were unlawfully taken as well.*" (emphasis supplied).

Id.

In *United States v. Whitten*, 706 F.2d 1000 (9th Cir.1983), the Court roundly condemned a series of excessive scope violations in the execution of a warrant. The searching team of between ten and twelve agents were looking for evidence of who owned a house, lived in it, and received mail there. The agents ended up taking "more than a thousand photographs from the house." 706 F.2d at 1009. One agent explained that "he was trying to be selective but did not have time to go through all of the photos; he therefore took the lot intending to look through them more thoroughly later." *Id.* Two metal strong boxes were taken from a bedroom and their contents examined at the office of the Drug Enforcement Agency. The boxes contained such extraneous items as "love letters, jewelry, marriage, divorce, and custody papers, a billing statement from a lawyer, a probation report, and form printed checks." *Id.* Underneath these items, however, the agents found drug paraphernalia and precursor chemicals.

The Court did not hesitate to condemn the excesses perpetrated in the execution of the search:

> "We disapprove the removal by the agents from the house of large quantities of papers, photographs, an other items which *might* have been relevant to who lived or worked there." (emphasis in original).

706 F.2d at 1010. It nonetheless carefully tailored its sanction to the suppression of those items that had not been particularly described, leaving unsuppressed those other items that had been properly searched for and seized:

> "Although the search was not scrupulously confined to the terms of the warrant, it does not follow necessarily that all of the evidence seized must be suppressed. . . .
>
> . . . *All of the items* seized at Midway Road and *admitted into evidence were things which the DEA agents were authorized to take under the warrant. The trial judge ordered the return of nonrelevant items.*" (citations omitted) (emphasis supplied).

Id.

In *Marvin v. United States*, 732 F.2d 669 (8th Cir.1984), the searching agents consisted of Internal Revenue Agents, directed to seize files bearing on tax returns for certain years from a chiropractic office. The alleged scope violations were well described by the 8th Circuit, at 732 F.2d at 674:

> "In executing the warrant the agents seized a large number of file folders for later examination and copying of financial information. The agents removed entire patient files rather than segregate financial information at the clinic. Some files were seized that did not contain any financial information. Other files were taken that contained records dated before or after the period specified in the warrant, records belonging to other doctors, and personal correspondence and other items belonging to the Marvins."

The District Court ordered the IRS to return documents that did not reflect income or expenses for the four tax years specifically referred to in the warrant application and the warrant itself. The government did not challenge the District Court's order to return these records. The 8th Circuit accepted the ruling that there had been scope violations, *arguendo*, but nonetheless ruled that that fact would not mandate the total suppression of all seized items, including those that had been particularly described in the command clause of the warrant:

> "Even if there was an unlawful seizure beyond the limitations of the warrant, a question we do not reach, the Marvins have not made a sufficient showing to require that all documents seized during the search of the clinic be returned. *Unlawful seizure of items outside a warrant does not alone render the whole search invalid and require suppression and return of all documents seized, including those lawfully taken pursuant to the warrant.*" (emphasis supplied).

Id.

The 2nd Circuit joined this chorus in *United States v. Matias*, 836 F.2d 744 (2d Cir.1988). The search warrant was for evidence relating to the unlawful manufacture of cocaine-based products. The command clause of the warrant was aimed primarily at chemicals containing cocaine and other powders and dilutents used to mix cocaine, as well as paraphernalia used in the packaging of cocaine and related products. The command clause also included, however, currency and other valuables and any documentary evidence bearing upon the offenses. Matias urged that the wholesale seizure of books and records,

including personal photographs, transformed the search into a general one, thereby mandating the total suppression of everything seized under the warrant. In rejecting the claim, the 2nd Circuit joined the universal chorus as to the appropriate reach of the exclusionary sanction for a search violation:

> *"[W]hen items outside the scope of a valid warrant are seized, the normal remedy is suppression and return of those items, not invalidation of the entire search.* Courts have also indicated that the drastic remedy of the suppression of *all* evidence seized is not justified unless those executing the warrant acted 'in flagrant disregard' of the warrant's terms." (citations omitted) (emphasis supplied) (emphasis in original).

836 F.2d at 747.

A second occasion on which a United States Court of Appeals found such a flagrant disregard of the terms of a warrant as to merit total suppression was *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988). As in the first such instance, *United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978), the holding was based upon a finding that the entire search, from its inception, had been in significant measure a subterfuge. In Osage County, Oklahoma, agents of the Alcohol, Tobacco and Firearms Bureau (ATF) obtained a warrant to search a private home for illegally possessed and stolen firearms and for records pertaining to those offenses.

The culprit in the execution of that search warrant was a deputy sheriff from neighborirg Tulsa County. It was the deputy sheriff who supplied nformation from a confidential informant to the effect that Medlin possessed

the contraband firearms at his residence. The deputy, however, had also obtained information from the informant that Medlin possessed a wide variety of other stolen goods taken in a series of state crimes. The deputy did not pursue that investigation of state crime directly by applying for a search warrant, however, because of his poor working relationship with officials in Osage County. His ploy, rather, was to pass on the information with respect to firearms to ATF and then to go along with them on their raid. He "piggy-backed" on their entry but then marched to the sound of a different drum in looking for and seizing stolen items utterly unrelated to firearms. He ultimately seized 667 such items.

When the case first came before the 10th Circuit, the Court remanded for a further evidentiary hearing to explore whether the deputy sheriff had so manipulated events as to create a pretext for the search he was reluctant to pursue independently:

> "Because of the large number of seized items not listed in the warrant,[1] it is possible the police used this warrant as a pretext for a general search, which would taint the whole search."

United States v. Medlin, 798 F.2d 407, 411 (10th Cir.1986).

Upon remand, the district judge found that the search warrant was a pretext arranged by the deputy sheriff, although it was not necessarily so in the minds of

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[1] It is to be noted that "the large number of seized items not listed in the warrant" did not establish a flagrant impropriety *per se* but only suggested the possibility that the warranted search was being used as a pretext for a more general search.

the ATF Agents who had been the deputy's perhaps unwitting instruments. The district judge found that this was not an excess of zeal arising spontaneously in the course of an otherwise proper search but "an unauthorized activity which Deputy Carter had planned when he accompanied the ATF Agents on their authorized search for firearms." 842 F.2d at 1197. He further found that the deputy had "employed the execution of the federal search warrant as a 'fishing expedition.' " 842 F.2d at 1199. The 8th Circuit could not "say that these factual findings [were] clearly erroneous," *Id.*, and, therefore, affirmed the total suppression.[2]

Back in the mainstream, *United States v. Young*, 877 F.2d 1099 (1st Cir.1989), was a case involving a massive scope violation. Young's home was being searched pursuant to a warrant directing the officers to search for evidence of marijuana, cocaine, and related records and paraphernalia. While the search was in process, an IRS Agent heard about it and "crashed" the searching party. He seized "ten file drawers of records from the [garage] office . . . and later inspected them at State Police offices." The trial judge found that there had been a clear scope violation and suppressed all of the records seized by the IRS Agent for tax purposes. He declined, however, to suppress the evidence of drug violations properly seized under the warrant. The 1st Circuit affirmed that particularized exclusion:

> "Second, although Agent Blair seized many items outside the warrant's scope, '[u]nlawful

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[2] The 8th Circuit noted, as we have noted here, that "the Government has not here relied on plain view."

> seizure of items outside a warrant does not *alone* render the *whole* search invalid and require suppression and return of *all* documents seized, *including those lawfully taken pursuant to the warrant.*' " (emphasis in original).

877 F.2d at 1105. *See also United States v. Lambert*, 887 F.2d 1568, 1572-1573 (11th Cir.1989).

Although it handled the contention summarily, the Supreme Court, in *Waller v. Georgia*, 467 U.S. 39, 43 n. 3, 104 S.Ct. 2210, 2214 n.3, 81 L.Ed.2d 31, 37 n.3 (1984), affirmed the decision of the Georgia Supreme Court to deal with a scope violation in a warranted search through particularized exclusion rather than plenary exclusion:

> "Petitioners' second Fourth Amendment challenge is that police so 'flagrant[ly] disregard[ed]' the scope of the warrants in conducting the seizures at issue here that they turned the warrants into impermissible general warrants. Petitioners rely on lower court cases such as *United States v. Heldt* and *United States v. Rettig*, for the proposition that in such circumstances the entire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed. . . . The Georgia Supreme Court found that all items that were unlawfully seized were suppressed. In these circumstances, there is certainly no requirement that lawfully seized evidence be suppressed as well." (citations omitted).

Both the broad mainstream of case law, where particularized exclusion is an adequate sanction, and the rarer instances of "flagrant abuse," where plenary exclusion is the necessary sanction, share the common denominator of

some excess perpetrated during the execution of a warrant. "Excess," however, is a relative term. In determining the appropriate breadth of the sanction, the critical distinction is between 1) an instance of "the tail of the dog wagging excessively beyond the scope of its handler's command," on the one hand, and 2) the far different instance of "the tail actually wagging the dog," on the other hand. The distinction is not one that can be measured quantitatively, simply by counting and comparing the properly seized items with those improperly seized. It is a distinction, rather, between dominant purposes – between 1) seizures beyond the warrant's command attributable to honest mistake, excessive zeal, or even spontaneous opportunism, on the one hand, and 2) seizures beyond the warrant's command actually anticipated and intended by the searching officer, on the other. The question is whether the scope violation was a secondary incident of the search or its primary purpose.

The search warrant for the appellee's pharmacy in this case was not a pretext. The seizure of the Schedule II drugs, directed by Jack Freedman, was, in its worst light, a secondary incident of the search and not its primary purpose. Even if the tail wagged excessively, this was still not a case of the tail wagging the dog. The moving force behind this search was Trooper Hammel, not Jack Freedman.

We hold, therefore, that the order of the hearing judge directing the total exclusion of all items seized in the search of the appellee's pharmacy was in error and is hereby reversed. Necessarily, the case will have to be remanded for a determination of which seized items were clearly beyond the scope of the warrant's command or

were not otherwise seizable, which items should be excluded from evidence and returned to the appellee, and which other seized items fell within the warrant's command or were otherwise properly seizable, which items should not be suppressed.

The Search of the Home: "Poisoned Fruit" or "Independent Source"?

A review of the second exclusionary sanction directed at the search of the appellee's home involves a very different type of Fourth Amendment analysis.

The hearing judge ruled, quite properly we think, that there was no flaw either in the execution of the warrant to search the home or in its issuance, were the appraisal of probable cause to be confined to the four corners of the warrant application. The application incorporated the earlier application to search the pharmacy and then, simply by way of highlighting, independently repeated some of that probable cause. Utilizing the expertise of Trooper Hammel on the usual patterns of where evidence is likely to be found in cases of ongoing commercial operations such as this, the warrant application for the search of the home demonstrated that documentary evidence of the criminality would quite likely be found there. In terms of the predicate criminality itself, all of the probable cause that we have already discussed – emanating from Harold Brian Firor and John Andrew Hulse, from the confidential informant, and from the three attempted and consummated controlled buys – supported the search of the home as well.

Attached to the warrant application for the search of the home, however, was also the inventory sheet showing what had been recovered in the search of the pharmacy. In addition, several brief references were made to items recovered in the course of the first search. The hearing judge held that because tainted information had gone into the application for the search of the home, the entire search must be suppressed as the "fruit of the poisonous tree."

We hold that that ruling was in error. As *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), made indisputably clear, one rotten apple (or even many rotten apples) will not presumptively contaminate the entire barrel. In *Franks*, of course, the allegation was that a perjurious affidavit had tainted the application for a search warrant. On the threshold issue of whether a "taint" hearing was even mandated to examine the truth of such allegation, the Supreme Court held that if the tainted or perjurious information was not critical to the establishment of probable cause, the issue was moot. What the court must do is to factor out the allegedly tainted information and then measure the remaining untainted information. If what remains is, in and of itself, enough to establish probable cause, the allegedly tainted information is reduced to surplusage and its presence, tainted or untainted, becomes utterly immaterial. As the Supreme Court stated, at 438 U.S. at 171-172, 98 S.Ct. at 2684:

> "[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable

> cause, no hearing is required." (footnote omitted).

The Court asserted the same principle in more affirmative terms, at 438 U.S. at 156, 98 S.Ct. at 2676:

> "[I]f the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), was a case where the outcome was directly controlled by the *Franks* principle. Two defendants had standing to contest the search of a home in Taos. The warrant to search that home, as the warrant here, was, judged within its four corners, unexceptionable. Into the application for that warrant, however, had gone two unconstitutional monitorings by a beeper device, which represented intrusions into constitutionally protected places owned by the two defendants. The results of those Fourth Amendment intrusions were tainted. In refusing to invalidate the subsequent search warrant, however, the Court reiterated that unless the tainted material is indispensable to the establishment of probable cause, its presence is not fatal. The Court reasoned, at 468 U.S. at 719, 104 S.Ct. at 3305:

> "That information, which was included in the warrant affidavit, would also invalidate the warrant for the search of the house if it proved to be critical to establishing probable cause for the issuance of the warrant. However, if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid."

We ourselves observed in *Anne Arundel County v. Chu*, 69 Md.App. 523, 534 n.5, 518 A.2d 733 (1987) *aff'd*, *Chu v. Anne Arundel County*, 311 Md. 673, 537 A.2d 250 (1988):

> "*Franks v. Delaware*, . . . establishes . . . that even when tainted information is contained in a warrant application, the remaining untainted information . . . still must be appraised to see whether it alone might suffice to establish probable cause."

See also Yeagy v. State, 63 Md.App. 1, 8-10, 491 A.2d 1199 (1985); *Wilson v. State*, 87 Md.App. 659, 667-668, 591 A.2d 524 (1991).

The *Franks v. Delaware* technique of factoring constitutionally tainted material out of the warrant application and then assessing the remaining untainted information to see whether it, alone, establishes probable cause is but an instance of a broader phenomenon. The broader phenomenon is the so-called "independent source" exemption from the exclusionary sanction of the "fruit of the poisonous tree" doctrine.

The "fruit of the poisonous tree" doctrine holds that when the Fourth Amendment has been violated in obtaining evidence, such tainted evidence shall not only not be

used directly but shall not be used at all. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). It prohibits not only the direct use of the tainted evidence but also its derivative use. *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). A scope violation in the course of the execution of a search warrant would represent, for example, such a constitutional violation. Ordinary exclusionary principles would bar the direct use of the evidence at trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The "fruit of the poisonous tree" doctrine would go further and also bar such derivative uses of such evidence as the exploitation of the knowledge gained so as to develop further leads, *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); or, of pertinence here, the use of such tainted evidence to establish probable cause for the issuance of a subsequent warrant. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

The direct use of the exclusionary sanction is easy because a one-to-one relationship between the violation and its exploitation is clear. The application of the exclusionary sanction to derivative evidence, however, requires the establishment of a cause-and-effect relationship between the poisonous tree and its alleged fruit. The peril to be avoided is an indiscriminate lapse into the logical flaw of *post hoc; ergo, propter hoc* ("after this; therefore, because of this").

As a consequence of this caution, there have developed three well-established exemptions from exclusion under the "fruit of the poisonous tree" doctrine. They are sometimes referred to, in a commonplace flight of rhetoric, as "three ways of unpoisoning the fruit." More aptly,

they are three ways of determining that the fruit was not poisoned in the first instance. One of these, not here pertinent, is the "attenuation of taint." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Another, also not here pertinent,is "inevitable discovery." *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The third of the exemptions, the one that concerns us in this case, is that of "independent source." *United States v. Wade*, 388 U.S. 218, 239-242, 87 S.Ct. 1926, 1938-1940, 18 L.Ed.2d 1149, 1164-1166 (1967). That a constitutional violation preceded the discovery of the evidence in question does not establish that the constitutional violation caused the discovery. The time sequence does, indeed, establish a presumption to that effect. The State is given the opportunity, however, to demonstrate that the evidence proceeded from an independent source. *United States v. Wade*, 388 U.S. at 239-242, 87 S.Ct. at 1938-1940 (even following a tainted pretrial identification, an in-court identification is admissible if it is the result of the identifying witness' independent memory from the crime scene); *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (search warrant issued after unlawful entry into home is not tainted if no knowledge from the unlawful entry entered into the application for the search warrant); *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988) (issuance of a valid search warrant was wholly independent of an initial illegal entry into a warehouse).

Franks v. Delaware is but a variation on this theme. Notwithstanding the presence of tainted information in a warrant application, the adequacy of the remaining

untainted information to establish probable cause is, *ipso facto*, an independent source for the issuance of the warrant. Under the circumstances, whether the tainted information does not appear at all, *Segura v. United States, supra; Murray v. United States, supra*, or does appear, but only as nonpivotal surplusage, is inconsequential. The untainted information is a legally sufficient, energizing predicate for the issuance of the warrant, regardless of whether it stands alone or in tainted company.

Applying the *Franks v. Delaware* principle to the search of the appellee's home yields a simple conclusion. The mention in the warrant application for the home that Schedule II drugs had been recovered in the search of the pharmacy was not an indispensable or pivotal component of probable cause. It was a *de minimis* triviality. Remaining, untainted information abundantly established probable cause for the search of the appellee's home. In all likelihood, if we factored out the very fact that the pharmacy had ever been searched, the probable cause for the search of the home would not be fatally eroded. *A fortiori*, factoring out the passing mention of those items seized that were a scope violation would not fatally erode that probable cause. There was no justification for the invalidation of the warrant to search the home and for the suppression of its fruits.

SUPPRESSION ORDER FOR SEARCH OF APPELLEE'S HOME VACATED; SUPPRESSION ORDER FOR SEARCH OF APPELLEE'S PHARMACY VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

* * *

[p. M-45] executed clearly indicates that the motion to suppress should be granted.

THE COURT: May I borrow your copy of Leon as well as one of the additions of LaFave.

MS. PELLATIRO: I would be glad to.

THE COURT: We'll reconvene at 1:00.

I am not going to listen to anyone then.

MR. STAMM: Do you want to hear any argument on wiretap?

THE COURT: No. You are going to include that within your motion to dismiss anyway.

MR. STAMM: That is fine.

THE COURT: I am not going to do anything with regard to the wiretap.

I will issue my ruling on the motion.

MR. JOSEPH: I have another matter I have to attend to, but Mr. Stamm will be here to get the good news.

SUPPRESSION RULING

THE COURT: Mr. Stamm will be here.

(Brief recess.)

MR. STAMM: Good afternoon.

MS. PELLATIRO: Good afternoon, Your Honor.

THE COURT: This will take some time. Don't blame me.

First off, just as a general statement, personal [p. M-46] orientation by virtue of my work background, I have a tendency to try to take a practical attitude towards the difficulties of anyone in administrative agency, administrative position trying to attend to the details of the requirements of the law. I appreciate in some regards some deference is to be given to those practices, and that is just what it is worth, in case I forget to say it later.

Generally, we have here and there is no dispute as to the fact that on October 12, 1990, Trooper First Class David Hammel made application to the Honorable David Gray Ross for the issuance of a search warrant to search certain premises described as 9115 – I am sorry – 6201 Greenbelt Road, Greenbelt, Prince George's County, and that application for a search warrant clearly set forth the background, expertise of Trooper Hammel; and while that background expertise was not substantial, it was sufficient to cause reasonable reliance by Judge Ross on his ability to relate the matters about which the application was concerned. That application set forth certain information which was received from named and unnamed informants, and the information received proved to be reliable as a consequence of certain controlled buys and surveys of other pharmacies.

Included in the affidavit is a certain averment [p. M-47] that after all of this is stated Trooper Hammel on the basis of his experience and training believes that their [sic] existed probable cause and offered to Judge Ross that there was probable cause to believe that laws relating

to illegal distribution, possession with intent to distribute controlled dangerous substances relating to Health Occupations dealing with labeling requirements for prescription medicines and applicable to restaurant distribution by registrants of certain substances without required order forms and regulations of the Department of Health and Mental Hygiene dealing with the issuance of prescriptions are being violated.

The affidavit related specifically to at least – one word I can't pronounce – Glutethimide, Codeine, and Penicillin – although the search warrant as issued also identifies Doriden. The controlled buys also related to presumably a forged prescription relating to Penicillin. That warrant was issued by Judge Ross having found probable cause on October 12, 1990, and that warrant described with particularity the premises to be searched, specified there was probable cause to believe that Glutethimide, Codeine, and Doriden were concealed on the property, and authorized the entrance and search of persons and premises, including persons found on the premises who may be participating in violations of the [p. M-48] statute with reference to concealing evidence, as well as paraphernalia, controlled dangerous substances, authorized opening and searching of any safe, box, bag, compartment, or thing in the nature thereof found in or upon said premises or persons, to seize all evidence, paraphernalia, controlled dangerous substances, and monies used in or incidental to the conduct or operation of controlled dangerous substance violations found in or upon said premises or persons, to arrest all persons found in or upon said premises who may be participating

in violations of the before cited, and to bring the persons, evidence, and paraphernalia before Judge Ross or some judge of the State in and for Prince George's County.

The search warrant specifically identifies Article 27, Sections 286, 287, 289, Article 12 of the Health Occupations Article, Sections 515 and 601, and Article 21, Section 203 of the Health General Article as being violated. The provisions of Article 27 relate specifically to the unlawful distribution, manufacturing, dispensing of certain controlled dangerous substances, be they of Schedule I, II or III; also relates to certain requirements applicable to registrants under the Controlled Substances Act as to the manner in which and the extent to which certain controlled dangerous substances may be or prescriptions drugs may be dispensed [p. M-49] and generally requiring that the dispensement be pursuant to a prescription order or form from a practitioner as that phrase is described under the Controlled dangerous Substances Act. These provisions also require that the registrant dispense or distribute drugs in accordance with their license as registrations, so to speak.

Article 21, Section 203 of the Health General Article provides that if there is an outside container or wrapper for a food, drug, device, or cosmetic, then the person to whom this act is applicable is required to place a word, statement, or other information on the label of that outside container.

Although Article 12, Sections 15 and 601 of the Health Occupations Article are also referenced as the subject of potential violations, when I look at those sections, when I finally look at them right now, well, they

require that pricing on prescriptions be current, generally, among other things.

The Court is satisfied that Judge Ross was correct in finding that there was probable cause for the issuance of the warrant for the search of 6201 Greenbelt Road here in Greenbelt.

Please appreciate that I finally resolved this within my mind a few minutes ago.

The Court further finds that the search warrant [p. M-50] particularly read with the application authorized the seizure of Glutethimide, Codeine, Doriden, and Penicillin to the extent it may be there in unreasonable quantity as well as evidence of the filling of forged prescriptions for these items.

The Court finds that in executing a search warrant, the Maryland State Police, as well as, I believe it is, Doctor Freedman – am I correct in that name?

MR. STAMM: Freedman.

THE COURT: – Doctor Freedman exceeded the authorization under the warrant. The Court in so holding and looking at the circumstances – particularly, because the next holding is going to be the exclusion of the search warrant and the items seized were not done on the basis of those person's reasonable reliance or good faith reliance that the items beyond those specified are authorized under the Court's earlier finding and under the search warrant were reasonably within the scope of that warrant. I think I said it in a sense that it will come out in

a sentence there. I am basically saying that those persons executing the search warrant, particularly, Trooper Hammel, did not reasonably rely or did not exercise good faith reliance upon any belief that those items other than Glutethimide, Codeine, Doriden, Penicillin, evidence of forged prescriptions and evidence [p. M-51] generally relating to those matters were permissibly subject to seizure under Judge Ross's search warrant.

The Court recognizes, number one, that the person making application for the search warrant was Trooper Hammel. Trooper Hammel in making application for the search warrant was very careful to detail the information that came to him. The concern expressed by Doctor Trigoe that there were forged prescriptions for Glutethimide, Codeine, and Penicillin, further the controlled buys related to those three items, there was an effort by Trooper Shank – perhaps Trooper Shanks was successful, I don't recall – to obtain Penicillin on a forged prescription, the allegations and reference to an improper price being charged relates to those particular items, and, in fact, Trooper Hammel would be so careful as to specify particular drugs in the warrant which was prepared for Judge Ross's signature in the event that he were to find probable cause on the basis of Trooper Hammel's application.

The Court further accepts without controversy the testimony of Trooper Hammel that the Schedule II drugs were seized at the direction of Doctor Freedman who expressed his intention to have the license of Mr. Klingenstein suspended.

Trooper Hammel relied upon the direction of Mr. [p. M-52] Freedman, not any belief as to the scope of the warrant being greater than that expressed. The Court acknowledges that certain items were seized reasonably within the scope of the search warrant. However, considering that more than four hours was consumed in conducting this search, and further considering that three boxes of items seized that were examined by the Court yesterday, that there is no way for the Court to draw any fine line as to how much time it would have taken to seize allowable items as opposed to impermissible items. The search was conducted in a general manner without regards to the limits of the search warrant, and for that reason the motion to suppress items seized under the search warrant issued for 6201 Greenbelt Road, Greenbelt, Price George's County, Maryland, must be granted.

In reference to the search warrant issued for 9115 49th Place, I believe, in College Park, Maryland, obviously, this search warrant's validity is in part reliant upon the – dependent upon the validity of the search warrant issued for 6201 Greenbelt Road.

I am satisfied that the search warrant was validly issued, though not properly executed. However, the application made by Trooper Lowman for the issuance of that search warrant relied not merely upon the application made for the issuance of the search warrant for 6201 [p. M-53] Greenbelt Road; it also relied upon communicating to Judge Kelly the successful execution of the earlier search warrant.

Particularly, considering that in State's Exhibit Number 3, while reference is made to the attachment of

the earlier search warrant, the earlier search warrant application is really not included in the official – the Court – the record supplied by the Clerk of the District Court, the Court is convinced that the second search warrant and items seized pursuant to it must have been relied in part on the fruits of the poisonous tree. So the motion to suppress search warrant issued for 9115 49th Place, College Park, Maryland, is also granted.

All exhibits will be returned. The search warrants will need to be resealed. There one is for District Court that will have to be returned to the Clerk of the District Court and State's Exhibit Number 4 is returned to the State presently and Defendant's Exhibits Numbers 1 and 2 are returned to the defense.

MR. STAMM: Thank you. Your Honor.

THE COURT: This is not one instance where the Court considers the question of the validity of the – as I said, the first search warrant. The Court determines it to be valid, it is a question of the execution, and within this Court's opinion, it is not a marginal question as to [p. M-54] whether or not the warrant was executed properly. Thank you.

MR. STAMM: May we be heard briefly as to scheduling matter? Before Mr. Joseph left this morning, he indicated to us – I think he probably told us in chambers he had a problem with trying both parts of the case back to back, and Mr. Patterson and I have discussed – and I think it is clear in your calendar May 12th for the theft portion of the trial.

MS. PELLATIRO: We have also, if I may, Roland Patterson for the record talked with assignment office that date is clear we would like to reset the theft portion of the trial for May 12th if the Court consents.

THE COURT: I will work. I will be here.

MR. STAMM: Thank you. So I guess you're granting the continuance then I guess it is a joint request to continue. Defense request. It is our request to continue the theft portion.

THE COURT: The other part is set for trial. I don't know you will have to assess.

MR. STAMM: I understand that, but I am assuming at this point that we are going to go.

THE COURT: Trial relating to theft is continued until May 12th.

MS. PELLATIRO: Thank you. Your Honor.